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Supreme Court of the United States

OCTOBER TERM, 1952

No. 295

ARNETT M. HOWARD, KENNETH M. JOHNSON, EDWARD W. MICHEY, ET AL., APPELLANTS,

vs.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

FILED AUGUST 27, 1952

Probable Jurisdiction Noted October 27, 1952

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF APPEALS OF KENTUCKY

ARNETT M. HOWARD, et al., Appellants

vs.

COMMISSIONERS OF THE SINKING FUND, et al., Appellees

STATEMENT ON APPEAL

(1) The names of the parties to this appeal are as stated in the above caption.

(2) The judgment appealed from was rendered by the Jefferson Circuit Court, Chancery Branch, First Division, on June 4th, 1952, and may be found on Page 30 of the Transcript of the record herein.

(3) The appeal was granted by the Court below and no summons are desired.

(4) The names and addresses of Counsel for the Appellees are as follows:

Hon. Gilbert Burnett, City Attorney, City Hall, Louisville.

Mr. Alex Humprey, Asst. City Attorney, City Hall, Louisville.

(S.) William A. Armstrong, D. E. Armstrong.

[fol. 2] [Caption omitted]

[fol. 3] JEFFERSON CIRCUIT COURT CHANCERY BRANCH
FIRST DIVISION COMMONWEALTH OF KENTUCKY

ARNETT M. HOWARD, KENNETH N. JOHNSON, EDWARD W. MICHEY and WILLIAM H. WINES, for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant, Plaintiffs,

vs.

COMMISSIONERS OF THE SINKING FUND of the City of Louisville; CHARLES FARNSLEY, Mayor and member; DANN C. BYCK, member; THOMAS GRAHAM, President; MERLE E. ROBERTSON, Vice President; LEE P. MILLER, member. All of whom comprise the Commissioners of the Sinking Fund of the City of Louisville, Kentucky; BEN J. BRUMLEVE, Secretary-Treasurer of the Sinking Fund of the City of Louisville, Defendants

PETITION IN EQUITY—Filed May 23, 1951

Plaintiffs, Arnett M. Howard, Kenneth N. Johnson, Edward W. Mickey, and William H. Wines, state that they are resident of Jefferson County, Kentucky, and that the defendants, Commissioners of the Sinking Fund of the City of Louisville, Kentucky, is a Commission duly created and established by virtue of K.R.S. 91.130; that each of the individual defendants are members and officers of said Commission; Charles Farnsley and Dann C. Byck by virtue of their offices as Mayor and President of the Board of Aldermen respectively; Merle E. Robertson as Vice-President, Lee P. Miller as a member, and Thomas Graham as President of said Commission, duly elected by the Board of Aldermen, and Ben J. Brumleve as the duly elected Secre- [fol. 4] tary-Treasurer of the said Commission. Plaintiffs further state that the Commissioners of the Sinking Fund is the administrative body charged with the administration of the Sinking Fund, and Ben J. Brumleve, Secretary-Treasurer, is charged with the enforcement of the ordinances requiring payments to be made into said Sinking Fund. The defendant, City of Louisville, is a municipal corporation created under and by authority of law.

That the Board of Aldermen of the City of Louisville, on May 25th, 1948, enacted an ordinance, same being Ordi-

nance 112, Series 1948, which has been amended from time to time, and now appearing as Ordinance 83, Series 1950, which ordinance imposes an annual license fee for the privilege of engaging in any gainful occupation within the City of Louisville, and known as the occupational tax ordinance.

That the Board of Aldermen of the City of Louisville, on April 1st, 1947, enacted an ordinance, same being Ordinance 66, Series 1947, by which it was proposed to annex to the City of Louisville certain territories lying and being East and South of the then existing corporate limits of the City of Louisville, which ordinance was signed by the Mayor on April 1, 1947; and that on June 27, 1950 an ordinance was enacted, same being Ordinance 179, Series 1950, by which the proposed territory was annexed to the City of Louisville, which ordinance was signed by the Mayor on June 30, 1950. That included within the territory embraced in the annexation ordinance aforesaid is the land consisting of more than 135 acres on which is located the United States Naval Ordnance Plant, an instrumentality of the United States, which land was acquired by the United States by condemnation proceedings filed in the United States District Court for the Western District of Kentucky [fol. 5] in December, 1940, being Action No. 244, deed to land is recorded in Deed Book 1797, Page 337, in the office of the County Court Clerk of Jefferson County, Kentucky; that said land was acquired by the United States by and with the consent of the State of Kentucky under authority of K.R.S. 3/010, which reads as follows:

> "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of post offices, custom houses, courthouses, and other needful buildings, and for locks, dams and canals in improving the navigation of the rivers and water within and on the borders of Kentucky."

That by K. R. S. 3.020 it is provided:

"Kentucky retains jurisdiction for the execution of process, issued under its authority, over all lands in Kentucky heretofore or hereafter ceded to or acquired by the United States for the erection or establishment of post offices, custom houses, courthouses, locks, dams, canals, parks, cereteries or forest reserves."

That the United States, by and through the Secretary of the Navy accepted exclusive jurisdiction over the said land on May 23, 1941, which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky on May 26, 1941, and became effective on May 28th, 1941 at 12 o'clock noon.

That by reason of the acquisition of said land by the United States and the acceptance of exclusive jurisdiction by the United States, and the act of the Governor ceding the State of Kentucky's jurisdiction to the United States, [fol. 6] the lands comprising the United States Naval Ordnance Plant, to all intents and purposes, ceased to be a part of the state of Kentucky within whose bordeus it lies; and that consequently the State of Kentucky and or the City of Louisville have no legislative jurisdiction of any kind over the territory embraced within the boundaries of the lands so acquired by the United States, or any activities carried on thereon; and that the land, not being a part of the State of Kentucky could not and cannot lawfully be annexed so as to become a part of the City of Louisville, and that Ordinance 179, Series 1950, by which the City of Louisville attempted to annex such territory to the City is void in respect to the land owned by the United States and over which exclusive jurisdiction has been ceded to the United States by the State of Kentucky and said exclusive jurisdiction accepted by the United States; and that the lands on which is located the United States Naval Ordnance Plant is not a part of the said City of Louisville.

The plaintiffs, all of whom are employed by the United States Naval Ordnance Plant, suing in their own behalf and in behalf of all other employees of the United States

Naval Ordnance Plant, state that the question involved in this action is one of common and general interest to all employees who receive their income from work done and performed within the territory of the United States Naval Ordnance Plant over which the United States has exclusive jurisdiction; that the land on which the said United States Naval Ordnance Plant is located is not, under the law, a part of the City of Louisville; that it is impracticable to bring this group of employees, numbering several hundred persons, before the Court within a reasonable time, and plaintiffs seek to prosecute this action as a representative action for the benefit of all persons employed on the lands on which the United States Naval Ordnance Plant is located.

[fol. 7] That a question has arisen and there is a dispute and controversy as to whether plaintiffs and all other employees of the United States Naval Ordnance Plant, by reason of the attempted annexation of the said land, should pay the occupational tax or license fee under Ordinance 83, Series 1950, above referred to, the defendant, Ben J. Brumleve, as Secretary-Treasurer of the Commissioners of the Sinking Fund insisting that plaintiffs and all other employees of the United States Naval Ordinance Plant are subject to the tax or license fee, and must pay the same, and the plaintiffs and all other employees insisting that in as much as the land on which the United States Naval Ordnance Plant is located is not and cannot be a part of the City of Louisville they are not subject to the occupational tax or license fee.

That the defendant, Ben J. Brumleve, Secretary-Treasurer of the said Commissioners of the Sinking Fund, has and is calling on McF. W. Wood, Captain U. S. Navy and head of the United States Naval Ordnance Plant, to furnish to him and to the Commission Forms W-2 showing the earnings of each employee of the said United States Naval Ordnance Plant from July, 1950 to the end of 1950 and subsequent periods of time, and is attempting to coerce payment of said occupational tax or license fee from said employees of the United States Naval Ordnance Plant.

Plaintiffs state that their rights are affected, and that an actual controversy exists with respect to their rights and obligations under the law of the United States and the

occupational tax or license fee ordinance aforesaid, and they contend:

(1) That in as much as the United States purchased the land upon which the United States Naval Ordnance Plant is located by and with the consent of the State of Kentucky, and further, in view of the fact that the United States, by and through its Secretary of the Navy accepted exclusive jurisdiction over the said lands, which acceptance of exclusive jurisdiction was acknowledged and ceded by the [fol. 8] Governor of the State of Kentucky, that consequently the land over which the United States has exclusive jurisdiction is not in reality a part of the City of Louisville,

(2) That the City of Louisville cannot legislate on any question which affects the said land on which the United States Naval Ordnance Plant is located, and consequently these plaintiffs and all other employees of the United States Naval Ordnance Plant are not subject to the occupational tax or license fee;

(3) That their employment and earnings, being done and received for work performed on lands which is not a part of the City of Louisville and over which the United States has exclusive jurisdiction, is the same as if they were being employed and received their salaries outside the City and State;

(4) That the assessment and attempt to collect the occupational tax or license fee is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 5th and 14th Amendment to the Constitution of the United States; and

(5) That as a result of the above these plaintiffs and all other employees of the United States Naval Ordnance Plant are exempt from the provisions of Ordinance 83, Series 1950 and the regulations thereon.

Plaintiffs state that the defendant, Ben J. Brumleve, Secretary Treasurer of the Commissioners of the Sinking Fund, is construing the said Ordinance 179, Series 1950, by which the City of Louisville attempted to annex the land on which the United States Naval Ordnance Plant is located, as placing the said land within the corporate limits and a component part of the City of Louisville, and consequently construing Ordinance 83, Series 1950, which is the

occupational tax or license fee ordinance, as applying to [fol. 9] these plaintiffs and all other employees of the United States Naval Ordnance Plant, in a manner violative of the law, and that unless the defendants are enjoined from so doing, irreparable injury will result to these plaintiffs and all other employees of the United States Naval Ordnance Plant. Plaintiffs state that no injunction has been heretofore applied for, granted or refused by the Court or any circuit judge.

Plaintiffs state that they bring this action under Chapter 83 of the Act of the General Assembly of Kentucky at the session held in 1922, same now being Section 639a-1 et seq. Civil Code of Practice, and ask for a declaration of their rights.

Wherefore, plaintiffs pray;

(1) That the matters in controversy in this action involve a common or general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant and the defendants;

(2) That plaintiffs be permitted to prosecute this action for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant;

(3) That it be adjudged that an actual controversy has arisen and exists between these plaintiffs and all other employees of the United States Naval Ordnance Plant and the defendants; that the rights and obligations of all parties are affected by statute and the ordinance in question, and that a declaration of rights of the parties and construction of the statutes and ordinances involved is necessary and proper under the circumstances alleged and that the reasons exist for an immediate hearing and determination of the case.

(4) That the Court determine and declare:

(a) That the land upon which is located the United States Naval Ordnance Plant, after its purchase by the United States, by and with the consent of the State of Ken- [fol. 10] tucky; the acceptance of exclusive jurisdiction by the United States and the acknowledgment and ceding of the exclusive jurisdiction thereof by the Governor on May 26, 1941 to all intents and purposes ceased to be a part of

the State of Kentucky and therefore could not be subject to annexation by the City of Louisville;

(b) That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their income from work done and performed within the territory of the United States Naval Ordnance Plant over which the United States has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville;

(c) That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence, subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950;

(d) That plaintiffs' employment and the employment of all other employees of the United States Naval Ordnance Plant, being on land which is not a part of the City of Louisville or the State of Kentucky, and over which the United States has exclusive jurisdiction, is the same as if they were being employed and were receiving salaries outside the City of Louisville;

(5) That a temporary injunction be granted against the defendants and each of them, enjoining them from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against these plaintiffs and all other employees of the United States Naval Ordnance Plant, or from demanding the delivery of Forms W-2 from the said United States Naval Ordnance Plant or from assessing and collecting or attempting to collect the occupational tax or license fee from these plaintiffs and all other employees of the said United States Naval [fol. 11] Ordnance Plant; and that said injunction be made permanent on the final determination of this action;

(6) Plaintiffs further pray for their costs herein expended and for all proper, general or equitable relief to which they are entitled.

(S.) Armstrong & Armstrong, (S.) W. A. Armstrong, (S.) Donald E. Armstrong, Attorneys for Plaintiffs.

Duly sworn to by Arnett R. Howard and Kenneth M. Johnson. Jurat omitted in printing.

[fol. 12] In Circuit Court of Jefferson County

Summons and Returns

To the Sheriff of Jefferson County, Greeting:

We command you to summon ——— Commissioners of the Sinking Fund of the City of Louisville,

Charles Parnsley, Mayor, City Hall.

Dann C. Byck, Member, c/o Byck Bros., 532 S. 4th.

Thomas Graham, President, c/o Bankers Bond, Ky. Home Life Bldg., 237 S. 5th Street.

Merle E. Robertson, Vice President, c/o Liberty Nat'l Bank, 2nd & Market Sts.

Lee P. Miller, Member, c/o Citizens' Fidelity, 5th & Jefferson.

Ben J. Brumleve, Sinking Fund, City Hall.

City of Louisville, Serve Mayor, City Hall.

#327-997

to answer an Equity petition filed against the above named in our Jefferson Circuit Court, by Arnett M. Howard, Kenneth N. Johnson, Edward W. Michey, and William H. Wines, for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant and warn the above named that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option, and make due return of this summons within sixty days from the date hereof.

Witness, Karl E Rothrock, Clerk of said Court, this 23rd day of May 1951.

Karl E. Rothrock, Clerk; By (S.) L. H. Gross, D. C.

[fol. 13] Sheriff's returns on the foregoing summons are as follows, to-wit:

Executed 5-25, 1951 on Commissioner of the Sinking Fund of the City of Louisville by delivering to Ben J. Brumleve, Commissioner, a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Ben J. Brumleve by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25-1951 on Dann C. Byck by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Thomas Graham by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25-1951 on Merle E. Robertson by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed 5-25, 1951 on Lee P. Miller by delivering to him a copy of the within summons.

Bernard J. Bax, Sheriff, J. C. Ky, by (S.) Harry Riehl, D. C.

Executed on the defendant, Charles P. Farnsley, this the 5th day of June, 1951, by delivering a ~~true~~ copy of the within summons to Charles P. Farnsley, Mayor of the City of Louisville, through Mary Lou Hubbard, his secretary, the said Charles P. Farnsley, Mayor having filed a duly executed writing with me authorizing process to be served on the Mayor of the City of Louisville to be executed on him by serving either Mary Lou Hubbard, his secretary, or George A. Hendon, Jr., his executive assistant.

Bernard J. Bax, Sheriff Jefferson Co., Ky. By (S.) Harry Riehl, D. S.

Executed on the defendant, the City of Louisville on this the 5th day of June, 1951, by delivering a true copy of the within summons to Charles P. Farnsley, Mayor of the City of Louisville, through Mary Lou Hubbard, his secretary, the said Charles P. Farnsley Mayor, having filed a duly

executed writing with me authorizing process to be served on the Mayor of the City of Louisville to be executed on him by serving either Mary Lou Hubbard, Secretary, or George A. Hendon, Jr., executive assistant.

Bernard J. Bax, Sheriff, Jefferson Co., Ky. By (S.) Harry Riehl, D. S.

[fol. 15] In Circuit Court of Jefferson County

[Title omitted]

Special Demurrer—Filed June 29, 1951

Come the defendants herein, by counsel, and demur specially to the petition heretofore filed herein on the ground that the Court has no jurisdiction of the subject of the action.

(S.) Gilbert Burnett, City Attorney, Robert W. Meagher, Assistant City Attorney, Attorneys for Defendants.

[fol. 16] In Circuit Court of Jefferson County

[Title omitted]

General Demurrer—Filed June 29, 1951

Come the defendants herein, by counsel, and without waiving their special demurrer heretofore filed herein, demur generally to the petition on the ground that it does not state a cause of action against them or any of them and that it does not state facts sufficient to support a cause of action against them.

(S.) Gilbert Burnett, City Attorney, Robert W. Meagher, Asst. City Attorney, Attorneys for defendants.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER AUTHORIZING PROSECUTION OF CASE NS.. v. CLASS ACTION AND INJUNCTION —July 11, 1951

This action coming before the Court on special demurrer and general demurrer filed herein by the defendants, to the petition of the plaintiffs.

Now come the plaintiffs, by counsel, and in writing filed, move the Court to enter an order authorizing plaintiffs to prosecute this action for and on behalf of themselves and all other employees of the United States Naval Ordnance Plant as a class action.

The Court being advised, it is ordered by the Court that said motion be and same is hereby sustained.

[fol. 17] On motion of the plaintiffs, and the Court being sufficiently advised, it is ordered, and adjudged as follows:

Because the question in this action is one of common and general interest to all employees of the United States Naval Ordnance Plant, who receive their income from work done or services performed within the limits of the area on which is located the United States Naval Ordnance Plant, and it is impracticable to bring this group composed of more than four hundred persons, before the Court within a reasonable time, the plaintiffs are hereby authorized and directed to prosecute this action for and on behalf of themselves and all other employees of the said United States Naval Ordnance Plant.

The Court having heard arguments of counsel on the special demurrer filed herein by the defendants to the plaintiffs' petition, and the Court being advised, it is ordered by the Court that this action be and same is hereby submitted on both the special and general demurrers filed herein. Counsel to file briefs.

This action coming on to be heard, and the Court being sufficiently advised, it is now considered, ordered and adjudged that the defendants be and they are hereby enjoined from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against the plaintiffs and all other employees of the United States Naval Ordnance Plant, or from collecting or attempting to collect the occupational tax or license from

these plaintiffs and all other employees of the United States Naval Ordnance Plant until the final determination of this action.

Temporary Injunction and 8 copies issued.

[fol. 18] IN CIRCUIT COURT OF JEFFERSON COUNTY

ARNETT M. HOWARD, et al., Plaintiffs

v.

COMMISSIONERS OF THE SINKING FUND, et al., Defendants

OPINION—October 25, 1951

Plaintiffs are employees of the Naval Ordnance Plant operated by the Federal Government, which is located in territory formerly south of the City of Louisville but in 1947 attempted to be annexed to the City of Louisville by annexation ordinance adopted on June 30, 1950, which included the Naval Ordnance Plant; and the defendant, the City of Louisville, is attempting to impose an occupational tax on the employees who are admittedly employed and performing their services within the boundaries of the Naval Ordnance Plant.

The Plant, consisting of 135 acres, was acquired by the United States Government by condemnation proceedings in December, 1940, and was also acquired with the consent of the State of Kentucky under authority of K.R.S. 3.010, which reads as follows:

[fol. 19] "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of post offices, custom houses, courthouses, and other needful buildings, and for locks, dams and canals in improving the nagivation of the rivers and waters within and on the borders of Kentucky."

The Commonwealth of Kentucky retained only the jurisdiction of the said lands for the purpose of execution and

process issued under its authority in that the United States Government by and through the Secretary of the Navy acquired exclusive jurisdiction over the said land on May 13, 1941, which acceptance was acknowledged by the Governor of Kentucky on May 26, 1941, and became effective on May 28, 1941, at 12:00 noon.

Attack is made upon the ordinance of the City seeking to annex the territory acquired by the United States on the grounds:

(1) That inasmuch as the United States purchased the land upon which the United States Naval Ordnance Plant is located by and with the consent of the State of Kentucky, and further, in view of the fact that the United States, by and through its Secretary of the Navy accepted exclusive jurisdiction over the said lands, which acceptance of exclusive jurisdiction was acknowledged and ceded by the Governor of the State of Kentucky, that consequently the land over [fol. 20] which the United States has exclusive jurisdiction is not in reality a part of the City of Louisville;

(2) That the City of Louisville cannot legislate on any question which affects the said land on which the United States Naval Ordnance Plant is located, and consequently these plaintiffs and all other employees of the United States Naval Ordnance Plant are not subject to the Occupational tax or license fee;

(3) That their employment and earnings, being done and received for work performed on lands, which is not a part of the City of Louisville and over which the United States has exclusive jurisdiction, is the same as if they were being employed and received their salaries outside the City and State;

(4) That the assessment and attempt to collect the occupational tax or license fee is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 5th and 14th Amendment to the Constitution of the United States; and

(5) That as a result of the above these plaintiffs and all other employees of the United States Naval Ordnance Plant are exempt from the provisions of

Ordinance 83, Series 1950, and the regulations thereon. The Court is called upon in this action under the Declaratory Judgment Act to determine and declare:

(a) That the land upon which is located the United States Naval Ordnance Plant, after its purchase by the [fol. 21] United States, by and with the consent of the State of Kentucky; the acceptance of exclusive jurisdiction by the United States and the acknowledgement and ceding of the exclusive jurisdiction thereof by the Governor on May 26, 1941, to all intents and purposes ceased to be a part of the State of Kentucky and therefore could not be subject to annexation by the City of Louisville;

(b) That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their income from work done and performed within the territory of the United States has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville;

(c) That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence, subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950;

(d) That plaintiff's employment and the employment of all other employees of the United States Naval Ordnance Plant, being on land which is not a part of the City of Louisville or the State of Kentucky, and over which the United States has had exclusive jurisdiction, is the same as if they were being employed and were receiving salaries outside the City of Louisville.

Defendants have filed a special and general demurrer and it is argued by the defendants:

[fol. 22] (1) That the Naval Ordnance Plant heretofore referred to as a plant was properly included within the geographical boundaries of the City;

(2) This action is a collateral attack upon the valid annexation of which this court lacks jurisdiction, and

(3) Assuming that allegations of the petition are true, it does not state a cause of action and is therefore demurrable generally.

It is contended by the defendants that the pivotal question in this case seems to be whether the City of Louisville had jurisdiction to annex the plant along with the rest of the territory embraced in the ordinance of June, 1950, and that proper answer to this question can only be obtained by construing Article I, Section 8, Clause 17 of the Federal Constitution, which reads as follows:

> "To exercise exclusive legislation in all cases whatsoever over such district not exceeding 10 miles square as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for erection of forts, magazines, arsenals, dock yards, and other needful buildings."

There is no question but that the state and its political subdivision, the City of Louisville, is bound by the legislative act in which it consented to the acquisition of the [fol. 23] United States Government of the plant and retained jurisdiction only for the execution of process and therefore no act of the City of Louisville which attempted to exercise jurisdiction over the plant can be upheld. The claim of the plaintiffs of the acquisition of the land by the United States pursuant to Clause 17 aforementioned and the consent of the Commonwealth of Kentucky would create a separate and geographical province must be sustained.

Defendants in their brief admit that the Language used in the line of Supreme Court cases ending with Standard Oil Co. v. California (1934) 291 U.S. 245, 78 L. Ed. 775, and others would seem to support the argument of plaintiffs herein to the effect that such Federal areas are separate provinces or countries, but they argued more recent Supreme Court cases indicate a trend away from a separate province or country. They cite in support of their view cases of James v. Drave Construction Co. (1937) 302

U.S. 134, 82 L. Ed. 155, and James Stewart Co. v. Sadrakula (1940) 309 U.S. 94, 84 L. Ed. 596, Jewell v. Cleveland Wrecking Co. (1940) 111 Fed. (2d) 305. An examination of those cases shows that they are mostly labor cases. The Dravo case was the enforcement of a gross receipts tax. The question was (1) whether the state had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden on the operations of the federal government. The contractor was engaged in buildings locks and dams in the Kanawha River and the court found that a large part of the contractor's work was performed at his plant in Pittsburgh, Pennsylvania, and the [fol. 24] materials and equipment were fabricated at Pittsburgh and delivered to West Virginia where they were installed. The court said:

> "As to work done within the exterior limits of West Virginia the question is whether the United States has acquired exclusive jurisdiction over the respective sites. Wherever the United States has such jurisdiction the State would have no authority to lay the tax." Citing Surplus Trading Co. v. Cook, 281 U.S. 647, 74 L. ed. 1091.

It further said:

> "As to the beds of the Kanawha and Ohio Rivers. The present question is not one of paramount authority of the federal government to have the work performed for purposes within the federal province * * * or whether the tax lays a burden upon governmental operations; it is simply one of territorial jurisdiction."

It further held:

> "There does not appear to have been any acquisition by the United States to title to those lands, unless, as respondent urges, the occupation of the beds for the purpose of the improvements constituted an acquisition of title. * * * No transfer of title appears. The Solicitor General conceded in his argument at bar that the State of West Virginia retained its ter- [fol. 25] ritorial jurisdiction over the river beds and we are of the opinion that this is the correct view."

In the case at bar it is admitted that the Commonwealth of Kentucky did not retain any territorial jurisdiction over the plant except for the purpose of process and the defendant, as a political subdivision of the commonwealth, can claim no greater right than the Commonwealth of Kentucky, The opinion in the Dravo case cited supra further states:

> "Clause 17, (referring to Clause 17 of Section 8 of Article I) governs those cases where the United States acquires lands with the consent of the legislature of the state for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the state to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction." Citing cases.

It is noted that in the cession by the State of Virginia of the lands that concurring jurisdiction was retained over any land so acquired by the United States. Such is not contained in the Act of the Commonwealth of Kentucky which is involved in this case. They retained jurisdiction only for the service of process. All other jurisdiction was granted exclusively to the United States. The [fol. 26] court further said in the Dravo case:

> "It is not questioned that the State may refuse jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders, * * * In that event as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses."

The Court also held that the tax was valid on the ground that it did not lay a direct burden upon the Federal Govern-

ment, that it was not laid upon the Government, its property or officers, or upon an instrumentality of the Government. The respondent, Dravo Construction Company, was independent contractor. The tax was not laid upon the Government.

Being convinced that the defendant, City of Louisville, has no power to legislate over the territory embraced in the plant because of the exclusive jurisdiction, without res- [fol. 27] ervations, granted to the United States in the Act aforesaid, it is not necessary to discuss in this opinion the power of the City to levy tax upon the employees of the plant. The special demurrer must therefore be overruled.

None of the cases cited by the defendant show a trend away from the view taken by the Supreme Court in the earlier cases which created a separate province or country doctrine. The case at bar is a typical case which calls for the application of the separate province or country doctrine and which throws a shield over the whole plant area in this case which neither the City nor the State or any of its political subdivisions may penetrate. The general demurrer, as well as the special demurrer, must therefore be overruled for the reasons herein stated.

(S.) Lawrence F. Speckman, Judge.

October 25, 1951

[fol. 28] In Circuit Court of Jefferson County

[Title omitted]

Arnett M. Howard, et al., Plaintiffs,

vs.

Commissioners of the Sinking Fund, et al., Defendants

Judgment—November 13, 1951

This matter coming on to be heard on the defendants' special and general demurrers to the plaintiffs' petition, and the Court being sufficiently advised, it is now Considered, Ordered and Adjudged that the defendants' special and general demurrers to the petition be and the same are hereby overruled, and the defendants declining

to plead further, it is hereby ordered and adjudged that the rights of the parties be, and they are hereby declared to be as follows:

1. That an actual controversy has arisen and exists between the plaintiffs and the defendants.

2. That the matters in controversy in this action involve a common or general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant who received their pay for work done or services performed within the limits of the area on which is located the United States Naval Ordnance Plant, and the defendants.

3. That the area comprising the United States Naval Ordnance Plant, having been acquired by condemnation by the United States by and with the consent of the legis- [fol. 29] lature of the State of Kentucky, and over which area the United States had, on May 23, 1941, accepted exclusive jurisdiction under Title 40, Section 255, U.S.C.A., which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky on May 26, 1941, thereafter, to all intents and purposes ceased to be a part of the State of Kentucky, and therefore could not be subject to annexation by the City of Louisville.

4. That the plaintiffs and all other employees of the United States Naval Ordnance Plant who receive wages from work done and performed within the area on which the United States Naval Ordnance Plant is located, and over which the United States holds title and has exclusive jurisdiction, do not perform work within the boundaries of the City of Louisville.

5. That plaintiffs' employment and the employment of all other employees of the United States Naval Ordnance Plant, being in an area which is not a part of the State of Kentucky or the City of Louisville, and to which the United States holds title and has exclusive jurisdiction, is the same as though said employees were working and receiving wages outside the City of Louisville, in a foreign jurisdiction.

6. That plaintiffs and all other employees of the United States Naval Ordnance Plant are not, as a consequence subject to the payment of the occupational tax or license fee imposed by Ordinance 83, Series 1950 of the defendant City, and are exempt therefrom.

7. That the assessment and attempt to collect the occupational tax or license fee from these plaintiffs and all other employees of the United States Naval Ordnance [fol. 30] Plant is in violation of their constitutional rights in that it will deprive them of their property without due process of law under the 14th Amendment to the Constitution of the United States.

8. It is further ordered and adjudged that the defendants and each of them be and they are hereby permanently enjoined from enforcing or attempting to enforce the provisions of Ordinance 83, Series 1950 and the regulations thereof against the plaintiffs and all other employees of the United States Naval Ordnance Plant, or from collecting or attempting to collect the occupational tax or license fee from the plaintiffs and all other employees of the United States Naval Ordnance Plant.

9. It is further ordered and adjudged that the plaintiffs recover their costs in this action.

To all of which the defendants object and except, and pray an appeal to the Court of Appeals of Kentucky, which is hereby granted.

(S.) Lawrence F. Speckman, Judge.

(S.) W. A. Armstrong, D. E. Armstrong, Attorneys for Plaintiffs. Gilbert Burnett, City Attorney; Alex P. Humphrey, Asst. City Attorney; Robert W. Meagher, Asst. City Attorney, Attorneys for Defendants.

[fol. 31] In Circuit Court of Jefferson County

Arnett M. Howard, et al., Plaintiffs

vs.

Commissioners of the Sinking Fund of the City of Louisville, et al., Defendants

Order and Judgment on Mandate from Court of Appeals —June 4, 1952

Come the defendants, Commissioners of the Sinking Fund, et al., by counsel, and tender the mandate of the Court of Appeals which mandate reads in part:

> "The Court being sufficiently advised, it seems to them the judgment herein is erroneous.
>
> It is therefore considered that said judgment be reversed and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the City to collect the occupational license tax from persons employed at the Naval Ordnance Plant."

It is hereby ordered that said mandate be made a part of this record and filed herein.

Pursuant to said mandate and the opinion of the Court of Appeals in this case, it is hereby ordered that the judgment of this Court of November 13, 1951 set out in Judgment Book No. 121, pages 505-506 be set aside, and the general demurrer of the defendants is hereby sustained.

It appearing that the plaintiffs decline to plead further, [fol. 32] and the Court being sufficiently advised on the said mandate and the said opinion of the Court of Appeals in this action, it is now considered, ordered and adjudged that the rights of the parties be and they are hereby declared as follows:

1. An actual controversy has arisen and exists between the plaintiffs and the defendants.

2. The matters in controversy herein involve a common and general interest to plaintiffs and all other employees of the United States Naval Ordnance Plant who receive their pay for work done or services performed within the limits

of the area on which is located the United States Naval Ordnance Plant, and the defendants.

3. The area comprising the United States Naval Ordnance Plant, having been acquired by condemnation of the United States by and with the consent of the Legislature of the State of Kentucky, and over which area the United States had, on May 23, 1941, accepted exclusive jurisdiction, which acceptance was acknowledged by the Governor of Kentucky on May 26, 1941, was subject to annexation by the City of Louisville thereafter.

4. The plaintiffs and all other employees of the United States Naval Ordnance Plant who receive wages from work done and performed within the area on which the United States Naval Ordnance Plant is located, and to which the United States holds title and has exclusive jurisdiction, perform work within the jurisdiction of the City of Louisville.

5. Plaintiffs and all other employees of the United States Naval Ordnance Plant are, as a consequence, subject to the payment of an occupational tax or license fee imposed by Ordinance No. 83, Series 1950, of the City of Louisville.

[fol. 33] 6. The assessment and collection of the occupational tax or license fee from these plaintiffs and all other employees of the United States Naval Ordnance Plant is not in violation of their constitutional rights, nor does it deprive them of their property without due process of law under the Fourteenth Amendment to the Constitution of the United States.

7. It is further ordered and adjudged that the petition of plaintiffs be dismissed, and that defendants recover their costs in this action for which they may have execution.

8. To all of which plaintiff, by counsel, object and except and pray an appeal to the Court of Appeals of Kentucky, which is hereby granted.

June 4, 1952.

(S.) Macauley L. Smith, Judge.

Tendered by:

(S.) Alex P. Humphrey, Attorney for Defendants.

A copy of this order and judgment has been mailed to attorney for plaintiffs.

(S.) Alex P. Humphrey.

IN THE COURT OF APPEALS OF KENTUCKY

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, et al., Appellant

vs.

ARNETT M. HOWARD, et al., Appellee

MANDATE—May 16, 1952

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

[fol. 34] It is therefore considered that said judgment be *reversed* and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant; which is ordered to be certified to said Court.

A copy—Attest:

Acree Austin, C.C.A. By (S.) Irene C. Austin, D.C.

Issued 5-16-52.

[fol. 35] IN CIRCUIT COURT OF JEFFERSON COUNTY

[Title omitted]

SCHEDULE

The Clerk of the Court is hereby directed to prepare a transcript of the record filed in the Court of Appeals of Kentucky pursuant to the appeal allowed in the above styled action, and to include in such transcript of record the following:

(1) Petition in Equity
(2) Summons and Sheriff's return thereon
(3) Defendants' Special Demurrer
(4) Defendants' General Demurrer
(5) Motion
(6) Order dated July 11, 1951
(7) Second Order dated July 11, 1951

(8) Opinion of Judge Speckman
(9) Judgment dated November 13, 1951
(10) Order and Judgment dated June 4, 1952
Mandate of Court of Appeals
(11) This schedule.

Said transcript to be prepared as required by law and the rules of the Court of Appeals of Kentucky for filing with the Clerk of the Court of Appeals.

(S.) W. A. Armstrong, D. E. Armstrong, Attorneys for Plaintiff.
Gilbert Burnett (h), Alex P. Humphrey, Attorneys for Defendants.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] IN THE COURT OF APPEALS OF KENTUCKY

ARNETT M. HOWARD, et al., Appellants,

vs.

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellees.

Appeal from Jefferson Circuit Court Chancery Branch, First Division Macauley L. Smith, Judge.

PER CURIAM

This case was before this Court on a demurrer to the petition. Commissioners of the Sinking Fund of Louisville v. Howard, Ky., 248 S. W. 2d. 340. The judgment of the Circuit Court overruling defendants' demurrer was reversed for reasons set out in that opinion. Upon return of the case to the Circuit Court, judgment was entered in conformity with our opinion. This is an appeal from that judgment. No new issue or additional question is presented, and the Court has not changed its view on any of the questions formerly presented.

Judgment affirmed.

[fol. 38] IN THE KENTUCKY COURT OF APPEALS

ORDER OF SUBMISSION—June 13, 1952

Came parties by counsel, and filed joint motion to docket, advance and submit; which motion is sustained and case ordered docketed for the present term, advanced for hearing and submitted.

Came appellants, by counsel, and filed memorandum.

[fol. 39] IN THE KENTUCKY COURT OF APPEALS

ARNETT M. HOWARD, et al., Appellants,

vs.

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellees

Appeal from a judgment of the Jefferson Circuit Court Chancery Branch—First Division.

JUDGMENT—June 20, 1952

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants, their costs herein expended.

[fol. 40] IN THE COURT OF APPEALS OF KENTUCKY

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, et al., Appellants,

v.

ARNETT M. HOWARD, et al., Appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division

Judge Lawrence F. Speckman

OPINION OF THE COURT BY COMMISSIONER CULLEN

REVERSING

In a declaratory judgment action, the Jefferson Circuit Court held that the City of Louisville was not entitled to collect the city's occupational license tax from persons employed at the Naval Ordnance Plant, located upon property owned by the United States Government. The city appeals.

The controlling question is whether the city had power to annex the Federal area and make it a part of the city, so that persons working in the area would come within the terms of the license tax ordinance, providing that the [fol. 41] tax shall be computed on the gross receipts from work done, business conducted or services performed "in the city."

The area embracing the Naval Ordnance Plant was acquired by the Federal Government, by condemnation, in 1940. Thereafter, in 1941, the Secretary of the Navy accepted "exclusive jurisdiction" over the land, and the acceptance was acknowledged by the Governor of Kentucky. In 1947, the City of Louisville enacted an ordinance proposing the annexation of certain territory adjoining the city, including the Federal area, and in 1950 a final annexation ordinance was enacted, declaring the territory to be annexed to the city. The occupational license tax ordinance was orginally enacted in 1948, and was reenacted in 1950.

By an act of 1940, Title 4, Section 106, U.S.C.A., Congress provided that any state or "any duly constituted taxing

authority therein, having jurisdiction to levy such a tax," may levy and collect income taxes in any Federal area within the state "to the same extent and with the same effect as though such area was not a Federal area." By Title 4, section 110 (c), U.S.C.A., "income tax" is defined [fol. 42] as "any tax levied on, with respect to, or measured by, net income, gross income or gross receipts."

It is agreed by all parties that the area embracing the Naval Ordnance Plant came under the "exclusive jurisdiction" of Congress by virtue of Art. I. Section 8, Clause 17 of the Federal Constitution, KRS 3.010, the acceptance of jurisdiction by the Secretary of the Navy, and the recognition of that acceptance by the Governor of Kentucky. The difference of opinion is as to the effect of such exclusive jurisdiction.

It is the position of the appellees that, with respect to areas under the exclusive jurisdiction of Congress, the jurisdiction of the state and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the state within whose borders it lies; that such areas occupy the same status as if they were separate provinces or countries. In support of this position, appellees cite such cases as Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct 995; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227; United States v. Unzeuta, 281 U.S. 138, 50 S. Ct. 284; Surplus Trading Com- [fol. 43] pany v. Cook, 281 U.S. 647, 50 S. Ct. 455; Standard Oil Co. v. California, 291 U.S. 242, 54 S. Ct. 381; Silas Mason Co. vs. Tax Commission, 302 U.S. 186, 58 S. Ct. 233; and Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U.S. 285, 63 S. Ct. 628. We do not question the soundness of those cases, but we think they are not controlling of the issue before us.

The cited cases are authority for the proposition that the state is ousted of any jurisdiction to exercise sovereignty *within* an area under the exclusive jurisdiction of Congress. But in the case before us, the act of annexation by the city did not, of itself, represent any effort or attempt by the city to exercise jurisdiction within the area of the ordnance plant. The city merely elected that the area be included within its geographic boundaries as a political subdivision of the state.

We are impressed with the argument on behalf of the city that the annexation involved only a question of political geography, and not a clash of political sovereignties. Certainly, it could be of no concern to Congress, in which of its political subdivisions a state chose to consider a Federal area to be physically situated. Whether the ordnance plant is considered to be in Louisville or outside of [fol. 44] Louisville could in no way affect the exclusive jurisdiction of Congress to govern the area embracing the plant.

In Davis v. Howard, 306 Ky. 149, 206 S. W. 2d 467, we had under consideration another section of the Congressional Act of 1940, authorizing states to collect sales or use taxes in Federal areas. We held that the Act constituted a recession by the Federal Government, to the state, of a portion of the exclusive jurisdiction theretofore possessed by Congress, and that acceptance of such recession on the part of the state would be presumed in the absence of the showing of a contrary intent.

Under the Davis case, and those from other jurisdictions therein cited, it would appear that a Federal area within the geographic boundaries of a state lies dormant, so far as concerns the authority of the state to exercise jurisdiction within the area, as long as Congress retains exclusive jurisdiction, but when Congress recedes part of its jurisdiction the area comes back to life as a part of the state to the extent of the recession. It seems to us that, even before a recession of jurisdiction by Congress, the State should have the right to determine in which of its political subdivisions a Federal area shall be deemed [fol. 45] to be located, anticipating a recession of jurisdiction, such as the one in this case, that will extend to the political subdivisions as well as the state.

Actually, in the case before us, Congress had receded part of its jurisdiction to Kentucky, and to the political subdivisions of Kentucky, *prior to* the annexation by Louisville. The recession recognized that the land was located in Kentucky, not only with reference to the jurisdiction of the state, but also with reference to the jurisdiction of political subdivisions of the state.

We are advised that the specific question of the power

of a city to annex a Federal area has been passed on only in Wichita Falls v. Bowen, 143 Texas 45, 182 S. W. 2d 695, and in Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S. E. 2d 136. In both those cases the power to annex was upheld.

It is our opinion that the annexation of the ordnance plant by the City of Louisville was valid.

The appellees point out that the Congressional Act of 1940 authorizes only the levy of an "income tax," and that in City of Louisville v. Sebree, 308 Ky. 420, 214 S.W. 2d 248, this Court specifically held the Louisville occupa- [fol. 46] tional tax was not an income tax. It is true we held in the Sebree case that the tax was not an income tax within the meaning of the Kentucky Constitution, but the question here is whether it is an income tax as that term is defined in the Act of Congress. As previously pointed out in this opinion, the Act of Congress defines "income tax" to include any tax "measured by" net income, gross income or gross receipts. We said in the Sebree case that the Louisville tax is a license tax which "measures the value of the privilege by the amount of earnings or net profits." The tax clearly falls within the definition made by the Act of Congress.

The judgment is reversed, with directions to enter a judgment sustaining the general demurrer of the defendants, and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant.

[fol. 47] IN THE KENTUCKY COURT OF APPEALS

COMMISSIONERS OF SINKING FUND OF CITY OF LOUISVILLE, et al., Appellants,

vs.

ARNETT M. HOWARD, et al., Appellees.

Appeal from a judgment of the Jefferson Circuit Court Chancery Branch—First Division.

JUDGMENT—March 28, 1952

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded with directions to enter a judgment sustaining the general demurrer of the defendants and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant; which is ordered to be certified to said Court.

It is further considered that the appellants recover of the appellees, their costs herein expended.

[fol. 48] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed August 4, 1952

To the Honorable Chief Justice of the Court of Appeals of Kentucky:

Come now the appellants in the above entitled cause, and respectfully show:

On June 20, 1952, the Court of Appeals of Kentucky rendered its final decision and judgment in the above entitled cause affirming the judgment entered in the Jefferson Circuit Court on June 4th, 1952. The Court of Appeals of Kentucky had theretofore reversed the judgment of

the Jefferson Circuit Court on November 13, 1951. See Commissioners of the Sinking Fund, et al. v. Howard, 248 SW 2d 340. In that case there was drawn in question the validity of an ordinance of the City of Louisville levying an occupational or license fee in so far as it affected employees of such Federal area, on the ground that the annexation ordinance was repugnant to Article 1, Section 8, Clause 17 of the United States Constitution, and as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the judgment was in favor of the said ordinances' validity.

Considering themselves aggrieved by the final decision of the Court of Appeals of Kentucky in the case, appellants pray that an appeal be allowed to the Supreme Court of the United States, and for an order fixing the amount of bond for costs thereon.

[fols. 49-64] ASSIGNMENT OF ERRORS

The appellants assign the following errors in the record and proceedings in this cause:

1. The Court of Appeals of Kentucky erred in upholding the validity of the annexation ordinance, in so far as the Federal area is concerned, and in holding and deciding that the said ordinance did not violate Clause 17, Section 8, Article 1 of the United States Constitution.

2. The Court of Appeals of Kentucky erred in holding that after the United States had acquired title to the Federal area in question, and had, by reason of its use, exclusive jurisdiction under Article 1, Section 8, Clause 17 of the United States Constitution, and also by affirmative action of the Acting Secretary of the Navy, acting under authority conferred by Title 40, Section 255, U.S.C.A., the City of Louisville could, by ordinance enacted under Section 81,100 et seq K.R.S., annex such Federal area so as to make it a part of the City of Louisville and subject to its ordinances.

3. The Court of Appeals of Kentucky erred in holding that the City of Louisville's Occupational tax or license fee was an income tax within the meaning of the Congressional Act of 1940, shown as Title 4, Section 106, U.S.C.A., and

in holding that said occupational tax or license fee was not an income tax under the Constitution of Kentucky.

4. The Court of Appeals of Kentucky erred in holding that these appellants were not deprived of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellants pray that the judgment of the Court of Appeals of Kentucky, rendered June 20, 1952 in the above entitled cause, be reversed and judgment rendered in favor of appellants and for costs.

W. A. Armstrong, Donald E. Armstrong, Counsel for Appellants.

FILED: August 4, 1952

[fol. 65] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER ALLOWING APPEAL—August 4, 1952

The appellants in the above entitled cause having prayed for the allowance of an appeal to the Supreme Court of the United States from the judgment rendered in said cause by the Court of Appeals of Kentucky, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It is Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Court of Appeals of Kentucky in the above entitled cause as provided by law, and it is further Ordered that the Clerk of the Court of Appeals of Kentucky shall prepare and certify a transcript of the record, proceedings and judgments in said cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated: 8/4/52.

James W. Cammack, Chief Justice of the Court of Appeals of Kentucky.

[fols. 66-67] Cost Bond on Appeal approved and filed August 4, 1952 omitted in printing.

[fols. 68-71] Citation in usual form showing service on Gilbert Burnett and Alex Humphrey omitted in printing.

[fol. 72] IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRAECIPE FOR RECORD—August 6, 1952

To the Clerk of the Court of Appeals of Kentucky:

You are hereby requested to prepare a transcript of the entire record in this cause and to transmit it to the Clerk of the Supreme Court of the United States, at Washington, D. C., duly certified and authenticated, and within the time prescribed by the Rules of the Supreme Court of the United States, including in said transcript:

1. The record of appeal in said cause;
2. The opinion of the Court of Appeals of Kentucky;
3. All journal entries contained in the record and proceedings of the Court of Appeals of Kentucky relating to said cause;
4. The final judgment and decision of the Court of Appeals of Kentucky in said cause;
5. The judgment and decision of the Court of Appeals of Kentucky in the cause styled Commissioners of the Sinking Fund of the City of Louisville, et al v. Howard, et al, decided March 28, 1952, rehearing denied May 16th, 1952, which shall be attached as an appendix to your record;

6. The petition for appeal, assignment of errors and prayer for reversal;

7. Statement as to jurisdiction, including all appendices;

8. Order allowing appeal;

9. Bond;

[fol. 73] 10. The Original citation.

11. Acknowledgment of receipt of copy of petition for appeal, assignment of errors and prayer for reversal; Statement as to jurisdiction; Statement calling attention to Rule 12, Paragraph 3, United States Supreme Court rules; order allowing appeal.

12. This praecipe, including acceptance of service.

W. A. Armstrong, D. E. Armstrong, Attorneys for Appellants.

Dated: August 6th, 1952.

Copy of the praecipe received this 6 day of August, 1952.
Gilbert Burnett, Alex P. Humphrey, Attorneys for Appellees.

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, ——

No. —

STATEMENT OF POINTS RELIED UPON AND STIPULATION COVERING PRINTING OF RECORD

Appellants adopt their assignments of errors as their statement of the points to be relied upon in this Court.

It is stipulated that the whole of the record on appeal shall be printed.

W. A. Armstrong, D. E. Armstrong, Attorneys for Appellants; Gilbert V. Burnett, Alex P. Humphrey, Attorneys for Appellees.

Dated: August 6, 1952

[fol. 76] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 27, 1952.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

October 27, 1952.

(5030)

Office-Supreme Court, U.S.
FILED
AUG 27 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 295

ARNETT M. HOWARD, KENNETH M. JOHNSON, EDWARD W. MICHEY, ET AL.,

Appellants,

vs.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

STATEMENT AS TO JURISDICTION

W. A. ARMSTRONG,
DONALD E. ARMSTRONG,
Counsel for Appellants.

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IN THE COURT OF APPEALS OF KENTUCKY

ARNETT M. HOWARD, ET AL.,

vs. *Appellants,*

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE,

Appellees

STATEMENT AS TO JURISDICTION

Statement of Case

Appellants are employees of the United States Naval Ordnance Plant in Jefferson County, Kentucky. The instant case originated by appellants filing for a declaration of rights in the Jefferson Circuit Court, in which the validity of an ordinance enacted by the City of Louisville was attacked as being repugnant to Clause 17, Section 8, Article I of the Constitution of the United States. That ordinance proposed to and did annex to the City's existing boundaries a tract of land approximately 135 acres of which is owned by the United States, title to which had been obtained by a condemnation proceedings filed in the United States District Court for the Western District of Kentucky at Louisville in 1940. The action also attacked the validity of an ordinance enacted by the Board of Alderman of the City of Louisville, and known as the Occupational Tax Ordinance, imposing an occupational tax or license fee for the privilege of working within the City, in so far as that ordinance applied to these appellants. The attack on the first mentioned ordinance was based on the fact that after the property had been acquired

by the United States and after exclusive jurisdiction had been accepted by the United States, both under Clause 17, Section 8; Article I of the Constitution of the United States, and by affirmative action of the Acting Secretary of the Navy under authority conferred by Title 40, Section 255, U. S. C. A., the jurisdiction of the State of Kentucky was completely ousted for all purposes, and that state could not thereafter, under the general laws giving cities of the first class the right and authority to annex unincorporated territory outside its boundaries, give to the City of Louisville the right, power or authority to annex this Federally owned area, as any authority or jurisdiction therefore existing in the state had been ceded to the United States.

Special and general demurrers were filed by the appellees, both of which were overruled by the Jefferson Circuit Court. Appellees appealed to the Court of Appeals of Kentucky, and that Court reversed the case with directions to sustain the general demurrer, and holding that the City of Louisville could annex the Federally owned area.

A petition for rehearing was filed by these appellants which was denied by the Court of Appeals of Kentucky without opinion.

Thereafter the mandate of the Court of Appeals was filed in the Jefferson Circuit Court and a judgment entered adjudging (1) that the area comprising the United States Naval Ordnance Plant having been acquired by the United States by and with the consent of the Legislature of the State of Kentucky, and over which area the United States had, on May 23, 1941 accepted exclusive jurisdiction, which acceptance had been acknowledged by the Governor of Kentucky on May 26, 1941, was subject to annexation by the City of Louisville thereafter; (2) that the appellants herein and all other employees of the United States Naval Ordnance Plant were receiving wages for work done and performed within the area on which the United States Naval Ordnance

Plant is located, and to which the United States holds title and has exclusive jurisdiction over same, perform work within the jurisdiction of the City of Louisville; (3) that appellants and all other employees of the United States Naval Ordnance Plant are, as a consequence, subject to the payment of an occupational tax or license fee imposed by Ordinance 83, Series 1950 of the City of Louisville; and (4) that the assessment and collection of the occupational tax or license fee from the appellants and all other employees of the United States Naval Ordnance Plant is not in violation of their constitutional rights, nor does it deprive them of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States.

After the entry of this judgment the appellants appealed to the Court of Appeals of Kentucky, which Court affirmed the judgment of the Circuit Court.

The original opinion of the Court of Appeals of Kentucky in favor of the validity of the annexation ordinance and the validity of the occupational tax or license fee ordinance in so far as it applied to these appellants and all other employees of the United States Naval Ordnance Plant, expressly passed upon the Federal question and ruled in favor of the validity of the ordinances as against appellants' claim that they were repugnant to Article I, Section 8, Clause 17 of the United States Constitution, and to the Fourteenth Amendment of the United States Constitution. Petition for rehearing of the decision and judgment of the Court of Appeals of Kentucky was denied by the Court of Appeals of Kentucky without opinion on May 16th, 1952.

Appellants believe that this cause presents two distinct Federal questions:

1. That the City of Louisville's Annexation Ordinance of 1950 by which the Federally owned territory on which the

United States Naval Ordnance Plant is located, and over which the United States had accepted exclusive jurisdiction prior to the passage of said ordinance, was brought under the jurisdiction of the City of Louisville so as to include this area within the City's boundaries was and is void under Clause 17, Section 8, Article I of the Constitution of the United States and repugnant to Title 40, Section 255, U. S. C. A.

2. Under a proper construction of Title 4, Section 106, U. S. C. A., the Louisville Occupational Tax or License Fee Ordinance as construed by the Court of Appeals of Kentucky is not an income tax within the federal exemption.

Opinion Below

The opinion of the Court of Appeals of Kentucky on the original appeal is attached hereto as Appendix I, and the memorandum opinion on the second appeal is attached hereto as Appendix II. The original opinion is reported in 248 SW 2d 340.

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(2) of Title 28 of the United States Code.

Statutes of the State Involved

(1) K. R. S. 81.100.—Annexation statute for cities of the first-class reads as follows:

"The boundaries of cities of the first class shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or to reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to

be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in K.R.S. 81.100, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city."

(a) After federal jurisdiction acquired—this statute became inoperative as to this territory and the contrary ruling is a violation of Article I, Section 8, Clause 17 of the Constitution of the United States.

(2) Annexation Ordinance of 1950 did not bring this area within jurisdiction of the city of Louisville for any purpose and contrary holding violates Article I, Section 8, Clause 17 of the United States Constitution.

(3) Kentucky Constitution, Section 181, authorizes the Legislature to permit cities to impose taxes on franchises, trades, occupations and professions.

(a) K.R.S. 92.281, reads in part as follows:

"Cities of all classes are authorized to levy and collect any and all taxes provided for in Section 181 of the Constitution of the Commonwealth of Kentucky, and to use the revenue therefrom for such purposes as may be provided by the legislative body of the city."

This statute was enacted in 1948 (Chapter 131), many years after the Federally owned area in question was acquired by the United States and over which the Unifed States had previously accepted exclusive jurisdiction, and the statute cannot extend to this area under Article I, Section 8, Clause 17 of the United States Constitution.

(4) Ordinance 83, Series 1950—Occupational Tax Ordinance.

(a) Did not apply to this Federally owned area (supra).

(b) Was not an income tax within meaning of Title 4, Section 106, U. S. C. A.—City of Louisville v. Sebree, 308 Ky. 420.

(c) Is violative of the Fourteenth Aemndment of the Constitution of the United States.

(5) Pertinent parts of Ordinance 179, Series 1950, and Ordinance 83, Series 1950, are attached hereto as Appendix 3 and Appendix 4.

Date of Judgment and of Application for Appeal

The original opinion and judgment of the Court of Appeals of Kentucky was rendered on March 28, 1952. A petition for rehearing was denied on May 16th, 1952, without opinion. The second opinion of the Court of Appeals of Kentucky was rendered on June 20, 1952.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869.

Breard v. City of Alexandria, La., 341 U. S. 622, 71 S. Ct. 920.

In all three of these cases the validity of city ordinances were involved and their validity upheld by the highest court of the state to which they could be appealed, and were then appealed to the Supreme Court of the United States and its right to consider city ordinances as state statutes upheld.

Raising the Federal Question

In appellants' petition the validity of the ordinance annexing the Federal area was attacked as being in violation of Clause 17, Section 8, Article I of the Constitution of the United States, and as violative of the Fourteenth Amendment of the Constitution of the United States. The validity of the occupational tax or license fee ordinance as it applied to these appellants was attacked on the ground that it was not an income tax within the meaning of Title 4, Section 106, U. S. C. A., as the ground on which the United States Naval Ordnance Plant is located was exclusively under the jurisdiction of Congress.

These questions were expressly passed upon by the Court of Appeals of Kentucky, and it held that the annexation of the Federal area in question involved only a question of political geography and not a clash of political sovereignties.

Statement of the Ground upon Which It Is Contended the Questions Involved Are Substantial

The decision of the Court of Appeals of Kentucky is in direct contravention of a long line of cases from the Supreme Court of the United States. In fact, in its original opinion, the Court of Appeals of Kentucky said:

> "It is the position of the appellees that, with respect to areas under the exclusive jurisdiction of Congress, the jurisdiction of the state and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the state within whose borders it lies, that such areas occupy the same status as if they were separate provinces or countries. In support of this position, appellees cite such cases as Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 4 S. Ct. 995, 29 L. Ed. 264; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447; United States

v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Company v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Company v. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775; Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187; and Pacific Coast Dairy Co. v. Department of Agriculture of California, 318 U. S. 285, 63 S. Ct. 628, 87 L. Ed. 761. We do not question the soundness of those cases, but we think they are not controlling of the issues before us.".

By the above quotation we find the Court of Appeals of Kentucky saying in one breath that the cases cited by appellants are sound and uphold their contention, and in the other breath saying that they are not sound. The ruling is opposed to the decisions of the Supreme Court of the United States. As admitted by the Court of Appeals of Kentucky, the soundness of the cited cases is not questioned, and as those cases hold that under the facts as in this cause, the jurisdiction of the state is completely ousted for all purposes, and to all intents and purposes the land ceases to be a part of the state within whose borders it lies, the state cannot under its general laws give to the City of Louisville the right, power and authority to annex the Federal area so as to make it a part of the City and subject to its laws. The jurisdiction which is ousted from the state is "complete" jurisdiction for all purposes. Nothing is retained. The land in question cannot, under all of the decisions of the Supreme Court of the United States, with which the Court of Appeals of Kentucky is apparently in accord, be subject to the jurisdiction of the state and/or the City for any purpose.

S. R. A., Inc. v. *Minn*, 66 S. Ct. 749, 327 U. S. 558.

2. The Federal question involved herein has not been directly determined by the Supreme Court of the United States, and a determination of that question, i. e., the right

of a city to annex Federal areas over which the state has ceded its jurisdiction—should be made by the Supreme Court as soon as possible.

3. The decision of the Court of Appeals holds that the Occupational Tax or License Fee imposed by Ordinance 83, Series 1950, is not an "income tax" within the meaning of the Constitution of the State of Kentucky, but that it is an "income tax" within the meaning of the Congressional Act of 1940, being Title 4, Section 106, U. S. C. A.

The right to levy and collect an "income tax" under Title 4, Section 106, U. S. C. A. is predicated on the taxing authority (in this case the City of Louisville) "having jurisdiction to levy such a tax." In the absence of such jurisdiction (and the City of Louisville is barred by the Constitution of the State from levying and collecting an income tax) the taxing authority cannot levy and collect an income tax under Title 4, Section 106, U. S. C. A. aforesaid.

Title 4 does not give to state and other taxing authorities the absolute right to levy and collect an income tax, but simply gives to those taxing authorities who can qualify under the clause "having jurisdiction to levy such a tax" the right to levy and collect an income tax from Federal employees in Federal areas.

4. The occupational tax or license fee imposed by Ordinance 83, Series 1950, is not an income tax, as was held by the Court of Appeals of Kentucky in the case of *City of Louisville* v. *Sebree*, 308 Ky. 420, 214 S. W. 2d 248, nor is it a tax "based on income", as it does not affect receipts from stock dividends, interest on bonds, notes, deposits, or other income-producing activities.

Conclusion

We respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Respectfully submitted,

W. A. ARMSTRONG,
DONALD E. ARMSTRONG,
Counsel for Appellants.

Dated Aug. 4, 1952.

APPENDIX 1

COURT OF APPEALS OF KENTUCKY

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, ET AL., *Appellants*

v.

ARNETT M. HOWARD, ET AL., *Appellees*

Appeal from Jefferson Circuit Court, Chancery Branch, First Division, Judge Lawrence F. Speckman.

OPINION OF THE COURT BY COMMISSIONER CULLEN—REVERSING

In a declaratory judgment action, the Jefferson Circuit Court held that the City of Louisville was not entitled to collect the city's occupational license tax from persons employed at the Naval Ordnance Plant, located upon property owned by the United States Government. The city appeals.

The controlling question is whether the city had power to annex the Federal area and make it a part of the city, so that persons working in the area would come within the terms of the license tax ordinance, providing that the tax shall be computed on the gross receipts from work done, business conducted or services performed "in the City."

The area embracing the Naval Ordnance Plant, was acquired by the Federal Government, by condemnation, in 1940. Thereafter, in 1941, the Secretary of the Navy accepted "exclusive jurisdiction" over the land, and the acceptance was acknowledged by the Governor of Kentucky. In 1947, the City of Louisville enacted an ordinance proposing the annexation of certain territory adjoining the city, including the Federal area, and in 1950 a final annexation ordinance was enacted, declaring the territory to be annexed to the city. The occupational license tax ordinance was originally enacted in 1948, and was reenacted in 1950.

By an Act of 1940, Title 4, Section 106, U.S.C.A., Congress provided that any state or "any duly constituted taxing authority therein, having jurisdiction to levy such a tax" may levy and collect income taxes in any Federal area within the state "to the same extent and with the same effect as

though such area was not a Federal area." By Title 4, Section 110, (c) U.S.C.A., "income tax" is defined as "any tax levied on, with respect to, or measured by, net income, gross income or gross receipts."

It is agreed by all parties that the area embracing the Naval Ordnance Plant came under the "exclusive jurisdiction" of Congress by virtue of Art. I, Section 8, Clause 17 of the Federal Constitution, KRS 3.010, the acceptance of jurisdiction by the Secretary of the Navy, and the recognition of that acceptance by the Governor of Kentucky. The difference of opinion is as to the effect of such exclusive jurisdiction.

It is the position of the appellees that, with respect to areas under the exclusive jurisdiction of Congress, the jurisdiction of the state and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the state within whose borders it lies; that such areas occupy the same status as if they were separate provinces or countries. In support of this position, appellees cite such cases as Ft. Leavenworth R.R. v. Lowe, 114 U. S. 525, 5 S. Ct. 995; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227; United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284; Surplus Trading Company v. Cook, 281 U. S. 647, 50 S. Ct. 455; Standard Oil Co. v. California, 291 U. S. 242, 54 S. Ct. 381; Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 S. Ct. 233; and Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U. S. 285, 63 S. Ct. 628. We do not question the soundness of those cases, but we think they are not controlling of the issue before us.

The cited cases are authority for the proposition that the state is ousted of any jurisdiction to exercise sovereignty within an area under the exclusive jurisdiction of Congress. But in the case before us, the act of annexation by the city did not, of itself, represent any effort or attempt by the city to exercise jurisdiction within the area of the ordnance plant. The city merely elected that the area be included within its geographic boundaries as a political subdivision of the state.

We are impressed with the argument on behalf of the city that the annexation involved only a question of political geography, and not a clash of political sovereignties. Cer-

tainly, it could be of no concern to Congress, in which of its political subdivisions a state chose to consider a Federal area to be physically situated. Whether the ordnance plant is considered to be in Louisville or outside of Louisville could in no way affect the exclusive jurisdiction of Congress to govern the area embracing the plant.

In Davis v. Howard, 306 Ky. 149, 206 S.W. 2d 467, we had under consideration another section of the Congressional Act of 1940, authorizing states to collect sales or use taxes in Federal areas. We held that the Act constituted a recession by the Federal Government, to the state, of a portion of the exclusive jurisdiction theretofore possessed by Congress, and that acceptance of such recession on the part of the state would be presumed in the absence of the showing of a contrary intent.

Under the Davis case, and those from other jurisdictions therein cited, it would appear that a Federal area within the geographic boundaries of a state lies dormant, so far as concerns the authority of the state to exercise jurisdiction within the area, as long as Congress retains exclusive jurisdiction, but when Congress recedes part of the jurisdiction the area comes back to life as a part of the state to the extent of the recession. It seems to us that, even before a recession of jurisdiction by Congress, the state should have the right to determine in which of its political subdivisions a Federal area shall be deemed to be located, anticipating a recession of jurisdiction, such as the one in this case, that will extend to the political subdivisions as well as the state.

Actually, in the case before us, Congress had receded part of its jurisdiction to Kentucky, and to the political subdivisions of Kentucky, prior to the annexation by Louisville. The recession recognized that the land was located in Kentucky, not only with reference to the jurisdiction of the state, but also with reference to the jurisdiction of political subdivisions of the state.

We are advised that the specific question of the power of a city to annex a Federal area has been passed on only in Wichita Falls v. Bowen, 143 Texas 45, 182 S. W. 2d 695, and in Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S. E. 2nd 136. In both those cases the power to annex was upheld.

It is our opinion that the annexation of the ordnance plant by the City of Louisville was valid.

The appellees point out that the Congressional Act of 1950 (1940) authorizes only the levy of an "income tax", and that in City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2nd 248, this Court specifically held the Louisville occupational tax was not an income tax. It is true we held in the Sebree case that the tax was not an income tax within the meaning of the Kentucky Constitution, but the question here is whether it is an income tax as that term is defined in the Act of Congress. And previously pointed out in this opinion, the Act of Congress defines "income tax" to include any tax "measured by" net income, gross income or gross receipts. We said in the Sebree case that the Louisville tax is a license tax which "measures the value of the privilege by the amount of earnings or net profits." The tax clearly falls within the definition made by the Act of Congress.

The judgment is reversed, with directions to enter a judgment sustaining the general demurrer of the defendants, and upholding the right of the city to collect the occupational license tax from persons employed at the Naval Ordnance Plant.

APPENDIX 2

June 20, 1952.

COURT OF APPEALS OF KENTUCKY

Appeal from Jefferson Circuit Court, Chancery Branch, First Division, Macauley L. Smith, Judge

ARNETT M. HOWARD, et al., *Appellants,*

v.

COMMISSIONERS OF THE SINKING FUND OF CITY OF LOUISVILLE, et al., *Appellees*

Per CURIAM:

This case was before this Court on a demurrer to the petition. Commissioners of the Sinking Fund of Louisville

v. Howard, Ky., 248 S. W. 2d 340. The judgment of the Circuit Court overruling defendants' demurrer was reversed for reasons set out in that opinion. Upon return of the case to the Circuit Court, judgment was entered in conformity with our opinion. This is an appeal from that judgment. No new issue or additional question is presented, and the Court has not changed its view on any of the questions formerly presented.

Judgment affirmed.

Attorneys for Appellants: W. A. Armstrong, D. E. Armstrong, Louisville, Ky.

Attorneys for appellees: Gilbert Burnett, City Attorney; Alex Humphrey, Asst. City Attorney, Louisville, Ky.

APPENDIX 3

ORDINANCE NO. 179, SERIES 1950

An Ordinance Annexing to the City of Louisville Certain Territory in the County of Jefferson on the South Side of and Adjacent to the Present Boundary Line of the City of Louisville from the Said Boundary Line Southwardly and Between Taylorsville Road and Iroquois Park and to Extend the Boundary Line of the City of Louisville so as to Include Same

Whereas, by ordinance heretofore duly enacted by the Board of Aldermen of the City of Louisville and approved April 1, 1947, being Ordinance No. 66, Series 1947, the City of Louisville proposed to annex to the City the tract of land hereinafter more particularly described, and which territory lies to the south of and adjacent to a present southern boundary line of the City of Louisville; and

Whereas, by judgment duly entered in the Jefferson Circuit Court, Common Pleas Branch, Third Division, in actions No. 301302, J. W. Borders, et al. v. City of Louisville; 301308, George Nenner, et al. v. City of Louisville; 301315, Carl E. Brewer, et al. v. City of Louisville; 301316, Francis T. Schmidt, et al. v. City of Louisville; 301317, Fred P. Lotz, et al. v. City of Louisville; 301318, W. S. Bryan, et al.

v. City of Louisville; 301319, W. L. Baker v. City of Louisville; 301326, Payton Westerfield, et al. v. City of Louisville; 301356, Leonard Leo, et al. v. City of Louisville, the said proposal to annex under the said Ordinance No. 66, Series 1947, was approved, which judgment has been certified to the Board of Aldermen of the City of Louisville; Now Therefore, Be it Ordained by the Board of Aldermen of the City of Louisville:

Section 1. There is hereby annexed to the City of Louisville by extending the boundary line of the City of Louisville so as to include same, that certain territory which is now embraced within the County of Jefferson to the south of and adjacent to a present southern boundary line of the City of Louisville, more particularly described as follows, to-wit:

"Beginning at the intersection of the Boundary Line of the City of Louisville and the east line of Newburg Road; thence south with the Boundary Line of the City of Louisville and the east line of Newburg Road to the north line of Dundee Road; thence east with the north line of Dundee Road to the west line of Clagget Drive; thence north with the west line of Clagget Drive to the north line of Emerson Avenue; thence east with the north line of Emerson Avenue and the south, west and south boundary lines of Strathmoor Manor to the west line of Bardstown Road; thence north with the west line of Bardstown Road to the Boundary line of the City of Louisville; thence east with the Boundary line of the City of Louisville to the east line of Bardstown Road; thence south with the east line of Bardstown Road to the south Boundary line of Strathmoor Gardens; thence east with the south Boundary line of Strathmoor Gardens and the south Boundary line of the Town of Kingsley to the west line of Bon Air Avenue; thence north with the west line of Bon Air Avenue and the extension thereof to the north line of Taylorsville Road; thence east with the north line of Taylorsville Road to the west line of Dutchmans Lane; thence north and east with the west and north lines of Dutchmans Lane to a point in the extension of the east line of Air-

view Subdivision; thence south with the extension of and the east line of Airview Subdivision to the north line of Taylorsville Road; thence south and at right angles to Taylorsville Road 200.00 feet from the north line of Taylorsville Road to a point; thence west with a line 200.00 feet south of the north line of Taylorsville Road and parallel thereto to the intersection with a line 200.00 feet southeast of Ribble Road; thence southwest with a line 200.00 feet southeast of and parallel to Ribble Road to a point 200.00 feet northeast of the northeast line of Bon Air Avenue; thence southeast with a line 200.00 feet northeast of and parallel to Bon Air Avenue to a point 200.00 feet south of the south line of Goldsmith Lane; thence west with a line 200.00 feet south of and parallel to the south line of Goldsmith Lane to a point 200.00 feet west of the west line of Bardstown Road; thence north with a line 200.00 feet west of and parallel to the west line of Bardstown Road to a point 450.00 feet north of the north line of Gardiner Lane; thence west with a line 450 feet north of and parallel to the north line of Gardiner Lane to the intersection of said line with Schuff Avenue; thence continuing west with a line 450.00 feet north of and parallel to the north line of Schuff Avenue to the west line of Poplar Level Road; thence south with the west line of Poplar Level Road to the south right of way line of the Southern Railway; thence west and northwest with the south and southwest right of way line of the Southern Railway to a line midway between Springdale Avenue and Farmdale Avenue; thence west with a line midway between Springdale Avenue and Farmdale Avenue and its extension to the west of a line midway between Springdale Avenue and Farmdale Avenue to the west line of Preston Highway; thence south with the west line of Preston Highway to the northwest line of Johnson Road; thence southwest with the northwest line of Johnson Road to the northeast line of Ashbottom Road; thence northwest with the northeast line of Ashbottom Road to a point 2200 feet southeast of the center line of the intersection of Eagan Avenue and

Ashbottom Road as measured along the east line of Ashbottom Road; thence southwest to the intersection of the west right of way line of the Louisville and Nashville Railroad and a line 200.00 feet southeast of and parallel to the southeast line of Strawberry Lane; thence southwest with a line 200.00 feet southeast of and parallel to the southeast line of Strawberry Lane to the west line of Third Street Road; thence south with the west line of Third Street Road to the north line of Palatka Road; thence west with the north line of Palatka Road to the Boundary Line of the City of Louisville; thence along the Boundary Line of the City of Louisville in a northerly and easterly direction to the east line of Newburg Road the point of beginning, and excluding all areas included in incorporated towns or villages."

LUCILLE D. OGBURN,
C. B. A.;
DENNIS B. ZAK,
P. B. A.;
CHARLES CAREY,
Mayor.

Approved 6-30-50.

APPENDIX 4

ORDINANCE 83, SERIES 1950

On and after July 1, 1950, every person, association, corporation, or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one per centum of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1952.

No. 295

ARNETT M. HOWARD,
KENNETH M. JOHNSON,
EDWARD W. MICHEY, ET AL., - - Appellants,

versus

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - - - - - - - - Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

BRIEF FOR APPELLANTS.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

OPINIONS OF COURTS BELOW.

Judgment of the Jefferson Circuit Court, Chancery Branch, First Division, Kentucky (Record 19-21).

Judgment of the Jefferson Circuit Court, Chancery Branch, First Division, Kentucky, on mandate from the Court of Appeals of Kentucky (Record 22-23).

Commissioners of the Sinking Fund of the City of Louisville, et al., v. Howard, et al., 248 S. W. 2d 340.

Arnett M. Howard, et al., v. Commissioners of the Sinking Fund of City of Louisville, et al., 249 S. W. 2d 816.

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 295.

ARNETT M. HOWARD, KENNETH M. JOHNSON, EDWARD W. MICHEY, ET AL., - *Appellants.*

v.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - *Appellees.*

BRIEF FOR APPELLANTS.

May it please the Court:

Two questions are presented by this appeal:

1. Can land owned by the United States, to which exclusive jurisdiction had been ceded by the State, and over which, as a result, the State's jurisdiction had been completely ousted for all purposes, be thereafter annexed by a municipality under the general laws of the State and subjected to the jurisdiction of the municipality, and

2. Can Title 4, Section 106, U.S.C.A., giving to States and other taxing authorities therein the right

to levy and collect an "income tax" from Federal employees in Federal areas, be extended to permit a municipality to collect an "occupational tax" from such Federal employees in Federal areas, when such municipality lacks jurisdiction to levy an "income tax" under the Constitution of the State.

JURISDICTION.

In the original petition filed by appellants the validity of the ordinance annexing the Federally owned territory was attacked as being repugnant to Clause 17, Section 8, Article I of the Constitution of the United States. The validity of the occupational tax or license fee ordinance was attacked on the ground that it was not an income tax within the meaning of Title 4, U. S. C. A., Section 106, Subsection "C," as the land on which the United States Naval Ordnance Plant is located was not "in the City" and was exclusively under the jurisdiction of Congress.

These questions were expressly passed upon by the Court of Appeals of Kentucky, and the validity of both ordinances upheld against the claim of their being repugnant to the Constitution and laws of the United States.

The Federal question involved herein has not been directly determined by this Honorable Court, and a determination of that question should be made.

The Supreme Court of the United States has jurisdiction of this question under Title 28, U. S. C. A., Section 1257(2).

King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869.

Beard v. City of Alexandria, La., 341 U. S. 622, 71 S. Ct. 920.

Dean Milk Co. v. City of Madison, Wis., *et al.*, 340 U. S. 349, 71 S. Ct. 295.

STATEMENT OF CASE.

In December, 1940, the United States brought condemnation proceedings in the District Court for the Western District of Kentucky to obtain title to a tract of land lying just south of the territorial limits of the City of Louisville, on which the United States Naval Ordnance Plant was later constructed. The land was purchased by and with the consent of the Legislature of Kentucky under the general statutes, Section 3.010 KRS, which provides:

> "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this State heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of forts, magazines, arsenals, dock yards, post offices, custom houses, courthouses and *other needful buildings,* and for locks, dams and canals in improving the navigation of the rivers and waters within and on the borders of Kentucky." (Emphasis ours.)

Thereafter a deed conveying title of this land to the United States was recorded in the office of the Clerk of the Jefferson County Court, Kentucky.

Thereafter, on May 23, 1941, acting under authority of Title 40, U. S. C. A., the Acting Secretary of the Navy, the Hon. James Forrestal, accepted "exclusive jurisdicton" over the tract of land in question, which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky, the Hon. Keen Johnson, on May 26, 1941.

On April 1, 1947, *six years after* the United States had acquired title to the land and had acquired exclusive jurisdiction over it, the City of Louisville enacted an ordinance by which it proposed to annex to the City of Louisville certain territories lying east and south of the then City limits, and which ordinance *included the tract of land* owned by the United States and over which it had accepted exclusive jurisdiction, and on which, *at that time,* the United States Naval Ordnance Plant was located. On June 27, 1950, *nine years after the United States had acquired title to the land and had assumed exclusive jurisdiction,* the City enacted Ordinance 179, Series 1950, by which the territory embraced in the 1947 proposal ordinance was declared to be annexed to the City of Louisville.

On May 23, 1951, appellants, acting in behalf of themselves and all other employees of the United States Naval Ordnance Plant, filed a declaratory judgment action in the Jefferson Circuit Court in which the validity of the annexation of the land owned by

the United States and over which it had acquired exclusive jurisdiction was attacked (Record 2-8), as being repugnant to the Constitution of the United States, Clause 17, Section 8, Article I.

Demurrers were filed by the appellees, which were overruled by the lower court, and on October 25, 1951, the court rendered an opinion in which it held that after the United States had acquired title to the land in question, and had accepted exclusive jurisdiction over it, that thereafter the land for all purposes ceased to be a part of the State within whose borders it lies, and therefore the ordinance annexing the land to the City was void in so far as the land upon which the United States Naval Ordnance Plant was located was concerned (Record 13-19).

Appellees appealed to the Court of Appeals of Kentucky, and on March 28, 1952, that Court reversed the action (Record 27-30).

ASSIGNMENT OF ERRORS.

Appellants assign the following errors in the record and proceedings in this cause:

1. The Court of Appeals of Kentucky erred in upholding the validity of the annexation ordinance, in so far as the Federal area is concerned, and in holding and deciding that the said ordinance did not violate Clause 17, Section 8, Article I, of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that after the United States had acquired title

to the Federal area in question, and had, by reason of its use, exclusive jurisdiction under Clause 17, Section 8, Article I, of the Constitution of the United States, and also by affirmative action of the Acting Secretary of the Navy under Title 40, Section 255, U. S. C. A., the City of Louisville could, by ordinance enacted under the general laws of the State of Kentucky, annex such Federal area so as to make it a part of the City of Louisville and subject to its jurisdiction.

3. The Court of Appeals of Kentucky erred in holding that the City of Louisville's Occupational Tax or License Fee was an "income tax" within the meaning of the Congressional Act of 1940, shown as Title 4, Section 106, U. S. C. A., and in holding that said occupational tax or license fee was not an income tax under the Constitution of Kentucky.

4. The Court of Appeals of Kentucky erred in holding that these appellants were not deprived of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States (Record 32-33).

AFTER THE UNITED STATES HAD ACQUIRED TITLE TO THE LAND AND HAD ACCEPTED "EXCLUSIVE JURISDICTION" OVER IT, THE JURISDICTION OF THE STATE OF KENTUCKY CEASED FOR ALL PURPOSES.

Appellants contend that by reason of the acquisition by the United States of said lands on which the United States Naval Ordnance Plant is located, the acceptance of *exclusive jurisdiction* by the United States under Title 40, U. S. C. A., and the Governor's acknowledgment of the acceptance of exclusive jurisdiction by the United States, the land, to all intents and purposes, ceased to be a part of the State (Kentucky) within whose borders it lies for all purposes, and thta consequently the State of Kentucky and/or the City of Louisville have no legislative jurisdiction or any jurisdiction over the territory on which the United States Naval Ordnance Plant is located, or over any activities carried on thereon, or over any person on the enclave. The land on which the United States Naval Ordnance Plant is located never was and can never be geographically a part of the City of Louisville.

When the State of Kentucky ceded exclusive jurisdiction to the United States over the land in question, the City of Louisville could not acquire or take jurisdiction which the State of Kentucky did not have, and hence, acting under the general statute giving to the city the right to annex any unincorporated territory (KRS 81.100) (Appendix A) the City was necessarily restricted to such unincorporated and continu-

ous territory over which the State had jurisdiction, and was barred from annexing any territory over which the State did *not* have jurisdiction. In other words, the City of Louisville could not do *indirectly* what the State of Kentucky could not do *directly*. And so we arrive at the positive conclusion that the territory on which the United States Naval Ordnance Plant is located, to all intents and purposes, not being a part of the State of Kentucky, could not and can not lawfully be annexed so as to become a part of the City of Louisville, and that consequently the ordinance (No. 179, Series 1950) in so far as it affects the land in question is void, and was void from its inception.

THE STATE'S JURISDICTION AND ITS RIGHT TO GRANT POWER TO CITY OF LOUISVILLE TO ANNEX THIS TERRITORY WAS COMPLETELY OUSTED.

On all the law and facts the City could not *legally* annex this territory. This land was acquired by the United States and it had absolute title to it. The land was acquired by and with the consent of the Legislature of the State of Kentucky by virtue of KRS 3.010, *supra*. As heretofore set forth, on May 23, 1941, the United States, acting by and through the Hon. James Forrestal, Acting Secretary of the Navy, accepted exclusive jurisdiction over the territory by a letter to the Governor of Kentucky, which exclusive jurisdiction was effective at 12 o'clock noon on May 28, 1941, and this acceptance of exclusive jurisdiction by the

United States was acknowledged by Governor Keen Johnson on May 26, 1941. The acceptance of exclusive jurisdiction by the United States was in accordance with Title 40, U. S. C. A., Section 255, which provides, in part, as follows:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases, and at such times as he may deem advisable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing notice of such acceptance with the Governor of such State or in any such other manner as may be prescribed by law of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.'

When the United States, after acquiring title to the property in question with the consent of the Legislature of the State, and had in addition thereto ac-

cepted "exclusive jurisdiction" as provided by Title 40, U. S. C. A., above set out, the land so purchased ceased to be a part of the State in whose borders it lies. Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct. 995.

This principle of law was again expressed in the case of Yellowstone Park Transfer Co. v. Gallatin County, 31 F. 2d 644. In that case, Gallatin County, Montana, attempted to *tax personal property* owned by a Delaware corporation having its situs in that portion of Yellowstone Park within the territorial limits of that State and county. In 1891 Montana had ceded to the United States exclusive jurisdiction over and with respect to all lands within Yellowstone National Park, reserving concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of that State. The tax attempted to be collected was covered by a statute enacted *after* the date of cession. The Court, in denying the right to collect the tax, said:

> "In other words, after the date of cession, the ceded territory was as much *without the jurisdiction* of the State making the cession *as was any other foreign territory* except in so far as jurisdiction was expressly reserved." (Emphasis ours.)

The case above set out is for territory embraced in a national park, and is not Clause 17, Section 8, Article I, of the Constitution of the United States type of property.

Further, in the same case, the Court continued:

> "If exclusive jurisdiction over that portion of the park in the State of Montana was lawfully ceded to the United States, the cession inured to the benefit of both corporations and individuals, and the power to tax property in the ceded territory, whether corporate or individual, was at an end."

Attention is also called to the case of Surplus Trading Company v. Cook, 281 U. S. 647, 50 S. Ct. 455, wherein it is said:

> "When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated 'for the erection of Forts, Magazines, Arsenals, Dock-yards, and *other needful buildings*' (Const. Art. I, Sec. 8), the *Federal jurisdiction is exclusive of all State authority.*" (Emphasis ours.)

Numerous other decisions from this Honorable Court have held similar views in connection with jurisdiction over lands to which the United States has acquired title and to which exclusive jurisdiction has been ceded by the States, the universal holding being that when purchased by the United States with the consent of the Legislature of the State, and exclusive jurisdiction has been accepted by the United States, the jurisdiction of the State is *completely ousted* and to all *juridical* intents and purposes the land ceases to be a part of the State within whose borders it lies. Ft. Leavenworth R. R. v. Lowe, *supra;* Silas Mason

Co. v. Tax Commission, 302 U. S. 186, 58 S. Ct. 233; United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227.

In the Silas Mason Co. v. Tax Commission case, *supra*, this Court said:

> "The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising *any legislative authority*, including its *taxing* and *police power* in relation to the *property* and *activities* of *individuals and corporations* within the territory." (Emphasis ours.)

Can there be any question, so far as concerns the lands upon which the United States Naval Ordnance Plant is located, that there is a complete absence of any right in the State of Kentuky to interfere with the exercise of the functions of the Federal Government, or to *tax*, or to *regulate, license* or *exercise any jurisdiction whatever?* And, too, under authority of the cases cited, has the State of Kentucky any right or power to exercise any legislative authority in this territory? All of these prohibitions exist with reference to this particular tract of land, just the same as it exists with reference to the lands embraced in the Fort Knox Military Reservation. Kentucky has no jurisdiction of any kind there. Her power to tax, her police power, and all other activities are debarred.

After the acquisition of the land by the United States, and acceptance of "exclusive jurisdiction" by the United States over such lands, neither the State of Kentucky nor the City of Louisville could legislate *effectively* concerning matters beyond their jurisdiction and within territory subject *only* to control of the United States. Standard Oil Co. v. People of California, 291 U. S. 242, 54 S. Ct. 381; Murray v. Joe Garrick Co., 291 U. S. 315, 54 S. Ct. 432.

In the Garrick case, *supra,* the State of Washington attempted to extend the provisions of the Workmen's Compensation Law to cover employees of a private corporation engaged in work in the Puget Sound Navy Yards. The State Supreme Court held that the compensation act could not apply to territory beyond the authority of the State Legislature. On appeal to the Supreme Court of the United States, this Court said:

> "But it also held that act could not have any force in the Navy Yards, since it was adopted many years after the cession of jurisdiction by the State and the consequent acquisition of the tract by the United States. In this the Court was clearly right. *After the effective date of the State's cession the jurisdiction of the federal government was exclusive.*" (Emphasis ours.)

And so we again find the statement laid down by this Court that after the effective date of the State's cession of jurisdiction, the jurisdiction is exclusively in the United States, and neither the State Legislature, and certainly in this case, the City of Louisville, can

effectively legislate on any matter affecting such territory, and this necessarily includes the right to annex such territory.

It is generally recognized that State laws in effect prior to the transfer of exclusive jurisdiction from the State to the United States may continue in effect in the absence of Congressional legislation thereon, but once exclusive jurisdiction has been accepted by the United States (Title 40, U. S. C. A., *supra*), then all State laws, and of necessity City ordinances, cease to be a part of the laws of such territory. Hence, future statutes or ordinances of the City are not a part of the body of laws in the ceded area. James Stewart Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431.

In the case of Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U. S. 285, 63 S. Ct. 628, the Department of Agriculture of California attempted to regulate minimum price regulations on all milk sold to the War Department at Moffett Field. In denying the right to so regulate prices, this Court said:

> "Where California Milk Control Act was adopted after acquisition of Moffett Field by United States, minimum price regulations under the Act were inapplicable to sales of milk to War Department at the Field, since as to such federal territory Congress had combined powers of a general and State government."

Still another case holding similar views is Murray v. Joe Garrick & Co., *supra*, where this Court held that after the effective date of State's cession of exclusive

jurisdiction to the United States, Federal jurisdiction was exclusive and laws subsequently enacted by State were ineffective in such territory.

Even the State's power of eminent domain is null and void over land which has been acquired by the United States with the consent of the Legislature of the State, and over which the United States has accepted exclusive jurisdiction. Utah Power & Light Co. v. United States, 243 U. S. 389, 37 S. Ct. 387 (390).

In the latter case the United States brought an action to enjoin the continued use and occupancy, without its consent, of certain of its lands in forest reservation for works employed in generating and distributing electric power. The Power & Light Company contended that the claim must be tested by the laws of the State in which the lands were located, rather than by the legislation of Congress, and urged that lands of the United States within a State, when not used for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are lands of others. This Court, in answering that contention, said:

"To this we cannot assent."

And, further, the opinion said:

"* * * the settled course of legislation, congressional and state, and repeated decisions of this Court, have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States, be acquired.

"The State and the public generally almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its *supremacy over State enactments sustained.*" (Emphasis ours.)

The same opinion then continues:

"And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them.

"It results that State laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."

Isn't what the Court of Appeals of Kentucky holds in this cause the same thing contended for by the Power & Light Company in the case cited above? Here too, it was urged that this case must be tested by the laws of Kentucky rather than by the legislation of Congress, and that the land in question, owned by the United States and over which it has been ceded exclusive jurisdiction, and although used by the Navy Department as an "arsenal," is subject to the jurisdiction, powers and the laws of Kentucky in the same manner and to the same extent as are lands of others. The Court of Appeals of Kentucky held, in effect, that although the State of Kentucky had affirmatively ceded "exclusive

jurisdiction" to the United States, it can now, under the general laws, give to the City the right, power and authority to annex this territory and subject it to its ordinances, in the face of all authorities holding that after exclusive jurisdiction has been ceded to the United States, *the State in whose borders the land lies cannot legislate in any way concerning said lands,* and in the face of repeated decisions of this Honorable Court that in all cases where this has been questioned in this Court its validity has been upheld, and "its supremacy over State enactments sustained." Utah Power & Light Co. v. United States, *supra.* Isn't giving to the City of Louisville the right to annex this territory legislating concerning the land?

Still another case which clearly demonstrates the lack of power in a State to enact legislation which can affect territory owned by the United States and over which it has accepted exclusive jurisdiction is Western Union Telegraph Co. v. Childs, 214 U. S. 274, 29 S. Ct. 613, wherein it was held that the exclusive legislative power which Congress possesses over the Norfolk Navy Yards, excludes giving any operation or effect, within limits of such Navy Yards, to the provisions of the Virginia Code imposing a penalty upon telegraph companies for failure to deliver a message to addressee.

THIS JURISDICTIONAL QUESTION HAS BEEN DECIDED BY THE COURT OF APPEALS OF KENTUCKY.

This jurisdictional question has been decided by the Court of Appeals in an entirely different manner. In the case of Commonwealth v. King, 252 Ky. 699, 68 S. W. 2d 45, the bookkeeper of the Bank of Stithton was indicted in the Hardin Circuit Court for the offense of making false entries upon the books of the bank. Stithton was included in the lands comprising Fort Knox Military Reservation, and the bank was located on lands purchased by the United States and over which it had exclusive jurisdiction, both under the Constitution of the United States and under State law. A plea to the jurisdiction of the court was filed and sustained, and the Commonwealth appealed for a certification of the law. In affirming the lower Court, the Court of Appeals of Kentucky, Chief Justice Rees, said:

> "The question sharply presented is: Does section 8 of article I of the Federal Constitution give exclusive jurisdiction to the United States over offenses committed on land owned by the United States and acquired by it for one of more of the enumerated purposes by the consent of the Legislature of the State in which the land is located? In the light of the construction uniformly given Section 8 or article I of the Federal Constitution and the State statutes similar to our Section 2376 by the Supreme Court of the United States and numerous State courts of last resort, the answer to the question must be 'Yes.'

"It is the contention of the commonwealth that in enacting Section 2376 of our Statutes it was not the purpose of the Legislature to cede jurisdiction, but merely to consent to the acquisition by the United States of the land for the purposes specified in the act. The consent of the acquisition of land within the State by the United States, given by Section 2376, is without reservation. No right is reserved to the State."

And, further along in the same opinion, the Court of Appeals of Kentucky, said:

"When the Legislature of a State consents to the purchase of land by the United States, its consent may be accompanied by such reservation or conditions as it may see fit to impose, so long as they are not inconsistent with the free and effective use of the land for the public purposes intended. * * *

"But, in the absence of reservation in the consenting act, federal jurisdiction over land acquired by the United States by consent of the State is *exclusive of State authority.*" (Emphasis ours.)

And further in the opinion it quoted Mr. Justice Story's opinion in United States v. Cornell, Fed. Cas. No. 14867, 2 Mason, 60, as follows:

"When therefore a purchase of land for any of these purposes is made by the national government, and the State Legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution *ipso facto* falls within the exclusive legislation of Congress, and the *State jurisdiction is completely ousted.* This is the neces-

sary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State Legislature is by the very terms of the constitution by which all the States are bound, and to which all are parties, a virtual *surrender* and *cession* of its sovereignty over the place." (Emphasis ours.)

The Court of Appeals of Kentucky then continues:

"The question is not an open one. It long has been settled that, where lands for such a purpose are purchased by the United States with the consent of the State Legislature, the *jurisdiction theretofore residing in the State passes,* in virtue of the constitutional provisions, to the United States, *thereby making the jurisdiction of the latter the sole jurisdiction.* * * *

"When the United States purchases land in a State with the consent of its Legislature for one of the purposes enumerated in article I of Section 8 of the Federal Constitution, exclusive jurisdiction is acquired by the federal government, though cession of its jurisdiction by the State is not declared unequivocally, and the cases heretofore cited so hold." (Emphasis ours.)

And so we see the Court of Appeals of Kentucky holding in that case that the question is not an open one; that the jurisdiction of the State *ipso facto* is ousted . Such being the case, how then can the State, under its general laws, give any right, power or authority to the City of Louisville to annex such territory so as to acquire any jurisdiction over same, or even make it a part of the City. We think the answer is obviously it cannot.

The Court of Appeals of Kentucky, in its opinion (R. 27) recognizes the fact that when title to lands has been acquired by the United States, and the United States has acquired exclusive jurisdiction over that land, that thereafter the jurisdiction of the State and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the State within whose borders it lies; that such areas occupy the same status as if they were separate provinces or countries. It then states, after citing numerous cases so holding, that "we do not question the soundness of those cases, but we think they are not controlling of the issue before us." The issue before the Court of Appeals of Kentucky was, as previously stated, that the jurisdiction of the State *for all purposes* had been ceded to the federal government, and that consequently neither it nor the City of Louisville could acquire *any jurisdiction* over the territory, including the jurisdiction to annex. In other words, the Court of Appeals of Kentucky has held, although in ceding exclusive jurisdiction in the land in question to the United States the State of Kentucky reserved no jurisdiction or made any reservations of any kind, *that it must be read into the cession a reservation of its (the State) right to, under its general laws, give to the City the right, power and authority to annex the territory* and thus exercise legislative jurisdiction over the tract. This in the face of its opinion in the case of Commonwealth v. King, *supra*, and the many decisions from this Honorable Court holding to the contrary, and that the cession of the State's jurisdiction to the United States

constitutes a virtual "surrender and cession of its sovereignty over the place."

The United States Naval Ordnance Plant is an arsenal, or at least comes within the constitutional phrase "other needful buildings." The phrase "other needful buildings" has been construed by this Court as "embracing whatever structures are found to be necessary in the performance of the functions of the federal government." James v. Dravo Construction Co., 302 U. S. 134 (143). Therefore, in whatever category the Ordnance Plant falls, arsenal or "other needful buildings"—it certainly falls within the "exclusive jurisdiction" clause of Section 8 of Article I of the Federal Constitution.

Under its general laws giving permission or consent to the United States to purchase lands in Kentucky, the Legislature reserved no jurisdiction for this class of property. By Section 3.020 KRS (Kentucky Statutes), it is provided:

> "Kentucky retains jurisdiction for the execution of process, issued under its authority, over all lands in Kentucky heretofore or hereafter ceded to or acquired by the United States for the erection or establishment of post offices, custom houses, courthouses, locks, dams, canals, parks, cemeteries or forest reserves."

Nowhere was there a reservation of any jurisdiction for any of the land needed as an arsenal, or forts, magazines, etc., mentioned in the Constitution of the United States.

LAND TO BE ANNEXED MUST BE ANNEXABLE.

In order that territory may be annexed to a municipality it should have such unity of interest with the corporation as will make it a proper subject of municipal government. 37 Am. Jur. 643. What unity of interest with this tract of land, owned by the United States, and over which the United States has exclusive jurisdiction, can the City of Louisville have to "make it a proper subject of municipal government"? The State of Kentucky cannot legislate to affect it in any wise—consequently the City of Louisville cannot legally legislate for the territory, and cannot extend its jurisdiction to cover the territory by annexation. To put it another way—what it cannot *control* it cannot annex.

Generally, the City of Louisville has authority under the general laws of the State to annex territory contiguous to its boundaries; but where, as in this cause, prior to any attempt on the part of the City to annex, the State had ceded its jurisdiction to the United States, and such exclusive jurisdiction has been accepted by the United States, under all the decisions of this Court, the jurisdiction of the State was completely ousted and the State could not give to the City, under a general law, the right, power or authority to annex said territory and extend the jurisdiction of the City over said territory. It would be just as reasonable to say that the Town of West Point, a Sixth Class city, would annex all of the territory embraced in the Fort Knox Military Reservation.

It is a fundamental rule that a municipal corporation, in the exercise of its legislative powers, cannot enact any ordinance violative of the Constitution of either the Unted States or the State. However, both the State and the City have done this— violated the Constitution of the United States (Section 8, Article I) and Title 40, U.S.C.A., Section 255. How, then, can the City inflict its jurisdiction over the land on which the United States Naval Ordnance Plant is located?

The Constitution of the United States, by which all the States are bound, and to which are all parties, provides unequivocally that "Congress shall have exclusive jurisdiction, etc." This power was granted to Congress by the people of the original thirteen States, and as each succeeding State came into the Union, it adopted that Constitution as the law of the land. And each of the cases heretofore cited herein, states in almost identical language, that after the United States has acquired title to property within a State with the consent of that State's legislature, and had accepted exclusive jurisdiction, that thereafter the "jurisdiction of the State in whose boundaries the land lies, to all intents and purposes, is completely ousted, and the said State cannot legislate, police, regulate, nor *tax* corporations or individuals in such territory. Yellowstone Park Transfer Co. v. Gallatin County, *supra;* Silas Mason Co. v. Tax Commissioner, *supra;* James v. Dravo Construction Co., 302 U. S. 134, 58 S. Ct. 208; James Stewart Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431.

APPARENT DISSENTING CASE.

The Dravo Construction case above cited, at first blush, would seem to dissent from the previous cases cited. But let us examine that case. The question involved there was the *constitutional validity* of a tax imposed upon the gross receipts of the Construction Company. The case was reversed by this Court solely on the ground that TITLE to the river beds was in the State, althought subject to the power of Congress to use the lands under the streams "For any structure which the interest of navigation, in its judgment, may require." But, although burdened by that servitude, *"the State held title."* The opinion in that case continues:

> "There does not appear to have been any acquisition by the United States of *title* to these lands, unless as respondent urges, the occupation of the beds for the purpose of the improvement constituted an acquisition of title. But as the occupation was simply the exercise of the dominant right of the Federal Government, the servient *title* continued as before. No transfer of that *title* appears." (Emphasis ours.)

And so we see that in that case there never was a transfer of *title* to the United States, *nor any act by the United States to acquire either title or exclusive jurisdiction,* but there existed concurrent jurisdiction with the State.

The opinion further points out that at various times it is not unusual for the United States to own within

a State lands which are set apart and upon which are constructed structures for public purposes, without acceptance of exclusive jurisdiction, and that it is not mandatory for the United States to accept exclusive jurisdiction, and then adds:

> "Such ownership and use *without more* do not withdraw the lands from the jurisdiction of the State. The lands remain part of her territory and within the operation of her laws." (Emphasis ours.)

Then the opinion continues that when title *has* been acquired by the United States, and it has accepted exclusive jurisdiction then the State cannot *legislate in any way in such territory.* The opinion continues:

> "Clause 17 governs those cases where the United States acquires lands with the consent of the Legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the *terms of the cession,* to the extent that they may lawfully be prescribed, that is, consistent with the carrying out of the purpose of acquisition, *determine the extent of the federal jurisdiction.*" (Emphasis ours.)

This Court could not have reached a different conclusion in the Dravo case, when we look to the statute ceding to the United States the rights exercised by it in the lands involved. As pointed out by this Court, Section 3 of the General Laws of West Virginia (Section 3, Chapter I, Article I, Code of West Virginia)

cedes to the United States "concurrent jurisdiction with the State in and over any land so acquired * * * *for all purposes.*" Concurrent jurisdiction, not exclusive jurisdiction, and "for all purposes."

In the light of that case, let us examine the Kentucky laws to ascertain what jurisdiction was retained by it in ceding jurisdiction to the United States. As pointed out heretofore, Section 3.020 KRS retained jurisdiction for the service of legal process over land ceded to or acquired by the United States for the erection of post offices, custom houses, courthouses, locks, dams, canals, parks, cemeteries, or forest reserves. And this is all. Nowhere has there been a retention of her jurisdiction to permit annexation, to pass legislation governing the territory, or to tax, regulate, police, or in any manner to *control* the territory, and the word "arsenal" is singularly lacking from the enumerated structures.

The same principle of law was stated in the Sadrakula case, *supra.* In that case it was held that every vestige of the laws of the State must vanish, but that in some cases, the jurisdiction of the State continues until abrogation of those rules existing at the time of the surrender of the sovereignty. When a State reserves some jurisdiction, *that* jurisdiction remains. When absolute or exclusive jurisdiction is ceded, then *nothing* remains.

Another case in point is that of S. R. A., Inc., v. Minn., 327 U. S. 558, 66 S. Ct. 749. In that case the State of Minnesota was attempting to collect taxes on

property which had been deeded by the United States to an individual, and which had formerly been held by the United States as "exclusive jurisdiction" property. This Court affirmed the lower court in its holding that the property could be taxed, on the assumption that the State had accepted impliedly the return of jurisdiction by the United States to the State. But in that opinion this Honorable Court again stated:

> "The right of a State to tax realty directly depends primarily upon its territorial jurisdiction over the area. The realty of petitioner had been conveyed to and used by the United States for the essential governmental activities which authorizes the exercise of its exclusive legislative jurisdiction. Exclusive legislative power is in essence complete sovereignty. That is, not only is the Federal property immune from taxation because of the supremacy of the Federal Government, but *State, laws,* not adopted directly or impliedly by the United States, are ineffective to *tax* or regulate *other property or persons* upon that enclave." (Emphasis ours.)

The New Century Dictionary defines "enclave" as "an outlying portion of a country, entirely surrounded by the territory of another country." Consequently, the land on which the United States Naval Ordnance Plant is located, title to which is in the United States, and over which the United States has accepted exclusive jurisdiction, is a "separate country or province" under all the decisions of this Honorable Court.

In other words, while the United States holds title and "exclusive jurisdiction" for use of the land under the Constitution or by cession of the State, the State in whose boundaries the said land lies is entirely divested of all jurisdiction if the United States is to exercise "complete sovereignty," unless the plain language of the Constitution does not mean what it says.

TITLE 4, U. S. C. A.

We now come to the question of the effect of Title 4, U. S. C. A., Section 106. The pertinent part of that act reads as follows:

> "No person shall be relieved from liability for any *income tax* by any State, or by any duty constituted taxing authority therein, *having jurisdiction to levy such a tax*, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area, and such State or taxing authority shall have full jurisdiction and power to levy and collect *such tax* in any Federal area within said State to the same extent and with the same effect as though such area was not a Federal area." (Emphasis ours.)

Subsection "C" of Title 4, Section 106, defines "income tax" as a tax levied on, with respect to or measured by net income, gross income, or gross receipts.

And so we see that this Act applies strictly to "income tax," or net incomes, gross incomes or gross receipts. In 1950 the City of Louisville enacted an ordinance levying and collecting an "occupational tax or

license fee" from all persons engaged in activities "in the City" (Appendix B).

Kentucky Constitution, Section 181, authorizes the Legislature to permit cities to impose taxes on franchises, trades, occupations and professions. Kentucky Statute 92.281, passed under authority of the section of the Kentucky Constitution above set out, reads in part as follows:

> "Cities of all classes are authorized to levy and collect any and all taxes provided for in Section 181 of the Constitution of the Commonwealth of Kentucky, and to use the revenue therefrom for such purposes as may be provided by the legislative body of the City."

Nowhere is there any authorization, either in the Constitution or the Statute, for cities to "levy and collect an income tax."

The Court of Appeals of Kentucky, realizing that a municipal corporation could not, under the Constitution of Kentucky, levy an "income tax;" had previously held (City of Louisville v. Sebree, 308 Ky. 420) that the occupational tax levied by the City of Louisville under the ordinance was *not* an "income tax," but that it "lays the tax upon the privilege of working * * * within the City"; that the ordinance imposes "an annual *license fee* for the privilege of engaging in said activities."

Again, in the case of Cook, *et al.*, v. Commissioners of the Sinking Fund, 312 Ky. 1, the Court of Appeals of Kentucky said:

"As we have pointed out, the tax imposed by the Ordinance in question is not an *income tax.*" (Emphasis ours.)

But in this action we see the Court of Appeals of Kentucky saying:

"It is true we held in the Sebree case that the tax was *not an income tax within the meaning of* the Kentucky Constitution, but the question here is whether it is an income tax as that term is defined in the Act of Congress."

It must be remembered that Title 4, Section 106, says any State or taxing authority therein, *having jurisdiction to levy such a tax,* etc. No municipality in Kentucky has, as previously stated, authority to levy and collect an "income tax." Nor does Title 4, Section 106, give to municipalities the absolute right to levy an "income tax" on Federal employees in Federal areas. If the taxing authority lacks "*jurisdiction to levy such a tax,*" and the City of Louisville certainly lacks such jurisdiction under the Constitution of the Commonwealth of Kentucky, then the provisions of Title 4 cannot apply.

It is strange that if, as stated by the Court of Appeals of Kentucky, this "license fee" or "occupational tax" is an "income tax" within the meaning of Title 4, Section 106, Subsection C (net incomes, gross incomes, or gross receipts), the city exempts from the tax all receipts from stock dividends, interest on bonds, notes, deposits, and many other income-producing activities, as well as from rentals from real estate. If the terms

"net income, gross income, or gross receipts" means what the Court of Appeals of Kentucky now holds, why isn't the ordinance made to include these items. Is it because this would in fact constitute an "income tax," which, as previously shown, the City lacks jurisdiction to levy?

As previously stated, Title 4, Section 106, does not give to States and other taxing authorities therein the absolute right to levy and collect an "income tax," but simply gives to those taxing authorities who can qualify under the clause *"having jurisdiction to levy such a tax"* the right to levy and collect an "income tax" from Federal employees in Federal areas.

If, as held by the Court of Appeals of Kentucky, the "license fee" or "occupational tax" is an "income tax" within the meaning of Title 4, Section 106, or even a tax based on "income," then it follows that the Occupational Tax Ordinance (Appendix 4, Statement of Jurisdiction) is not only void as to Federal employees in Federal areas, but in its entirety, even to its application to persons who reside in and receive wages from occupations and activities carried on "in the City," as the City of Louisville, as has been pointed out several times, lacks the right, power or jurisdiction to levy and collect an "income tax" of any kind.

CONCLUSION.

We respectfully submit that the ordinance by which the City of Louisville annexed to its territorial limits the land which was owned by the United States and over which the United States had accepted exclusive jurisdiction was and is void in so far as it affects the land in question, and that therefore the said land cannot be said to be "in the City" within the meaning of the Occupational Tax Ordinance, nor does Title 4, Section 106 apply to this area, as the City of Louisville lacks "jurisdiction to levy" an income tax of any kind, and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX "A."

K. R. S. 81.100.—Annexation statute for cities of the first-class reads as follows:

"The boundaries of cities of the first class shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or to reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in K.R.S. 81.100, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city."

APPENDIX "B."

ORDINANCE 83, SERIES 1950.

On and after July 1, 1950, every person, association, corporation, or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one per centum of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952.

No. 295.

ARNETT M. HOWARD, ET AL., - - Appellants,

versus

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - - - - - - - - - - Appellees.

Appeal from the Court of Appeals of Kentucky.

BRIEF FOR APPELLEES.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

No. 295.

ARNETT M. HOWARD, ET AL., - - *Appellants,*

v.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - *Appellees.*

BRIEF FOR APPELLEES.

STATEMENT.

This suit was brought on by the City of Louisville seeking through its agent, The Commissioners of the Sinking Fund, to enforce its general and nondiscriminatory occupation tax upon appellants, who are employees of the United States Government. The tax is levied upon appellants pursuant to a permissive act of the Congress. It is not a conflict of sovereigns in which the Federal Government is interested in behalf of its functioning agencies. It is throughout a controversy between the local government and its subject taxpayers.

The individuals sought to be taxed are seeking to evade the impact of the taxing ordinance through an

interpretation of the Act of Congress which would not extend the terms of the Act to them; and further through a construction of the clause of the Federal Constitution which was drafted and has been interpreted to settle questions of primacy of sovereignty between the United States and local governments operating in the same area.

As the main line of resistance, the appellants have invoked Article 1, Section 8, Clause 17, of the Federal Constitution to protect their individual interests from the local government. As a mobile reserve in case of a break-through, they argue exemption from the terms of Title 4, U. S. C. A., Section 106, permitting local governments to levy the tax on Federal employees working within Federal reservations.

JURISDICTION.

We consider this a purely local problem, a conflict of local interest between the State and its political subdivisions and its own citizens. The contention of the appellants, however, that the City's annexation ordinance under State general law and the City's general law regulating taxing of individuals within its boundaries, as applied to the instant Federal reservation, is repugnant to Article 1, Section 8, Clause 17, of the United States Constitution and the adverse decision by the Kentucky Court of Appeals on that question, probably gives this Court jurisdiction to review the State Court of Appeals, Title 28, U. S. C. A., Section 1257 (2); Hamburg Amr. S. S. Co. v. Grube, 196 U. S. 407.

FACTS.

Appellants sued the appellee, Commissioners of the Sinking Fund of the City of Louisville, for a declaration of rights of the parties, praying that it be adjudged that appellants were not subject to the payment of the occupation tax or license fee imposed by the ordinance of the City of Louisville, and further prayed an injunction of the Commissioners from attempting to collect the tax (R. 8). The Commissioners of the Sinking Fund is a statutory body set up by the Legislature as an agency of cities of the first class (Louisville) to administer and pay the bonded debt of those cities (91.130, Kentucky Revised Statutes), and to collect fees imposed by the boards of aldermen of such cities (91.200, Kentucky Revised Statutes) (R. 2).

Appellants' petition stated, and it was taken as admitted by the general demurrer of the appellees (R. 11), that appellants were employed within the territory of United States Naval Ordnance Plant (R. 5); that the land upon which the Naval Ordnance Plant was located was acquired by the United States in 1940 for such purpose and such acquisition was consented to by a general statute of the Commonwealth of Kentucky (R. 3); that exclusive jurisdiction over the land was accepted in 1941 by the United States Government and acknowledged by the State in the prescribed manner (R. 4). In 1940 and 1941 the land was outside of the city boundary. In 1950 the land containing the Naval Ordnance Plant was included as part of a larger tract annexed to the City (R. 3). After the act of

annexation, the appellee Commissioners, through the appellee, Brumleve, attempted to assess the appellants for the City's general occupation tax, based on appellants' income earned as employees of the United States Government upon the land in question (R. 5).

Appellants also pleaded their theory of the case as conclusions, and not necessarily admitted by the general demurrer, that because of the acquisition of the land by the United States with full consent by the State and full and exclusive jurisdiction accepted by the Federal Government, it could not thereafter be annexed to the City by city ordinance enacted pursuant to a State statute. Appellants have continued to contend that this particular land has remained an island outside of the City and so beyond the authority of the City to tax occupations performed thereon (R. 4).

CONGRESS HAS RECEDED TO THE LOCAL GOVERNMENT THE POWER TO TAX APPELLANTS.

Appellants claim that the ordinance of annexation by the City pursuant to State statute and the assessment of the occupation tax by the appellees is an assertion by the City of jurisdiction over the Federal property. The claim is far too broad. The City is exercising its power of taxation only within the strict limits authorized by the Congress; it is asserting that small part of its otherwise extensive jurisdiction specifically allowed it.

This land is admittedly such over which Congress has exclusive legislative power under the Federal Con-

stitution and were it not for the Enabling Act of Congress the tax of the City on appellants would not be attempted by the Commissioners.

Title 4 U. S. C. A., Sections 105-110 (1951 Cumulative p.p.), sometimes referred to hereafter as the Buck Act, authorizes local political subdivisions to levy in Federal areas most of the common forms of revenue tax on individuals where the tax is not directly upon any function or agency of the United States. Pertinent here is Section 106, which provides:

"Section 106. Same; income tax.

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constitued taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

Section 110 (c) following defines "income taxes":

"Section 110. Same; definitions.

"As used in sections 105-109 of this title—

"(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The section of the Louisville Ordinance (Ordinance 83, Series 1950) levying the occupation tax is:

"Section 1. On and after July 1, 1950, every person, association, corporation or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be *measured by* one per centum of (a) all salaries, wages, commissions and other compensations earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City."

In discussing the import of this tax in Cook v. Commissioners, 312 Ky. 1, 226 S. W. 2d 328, and the assessment of United States Post Office employees therefor as a burden upon the Federal Government, aside from permissive provisions of Congressional Acts, the Kentucky Court of Appeals wrote:

"The sole question for our determination is whether employees of the United States Government are immune from liability for the tax imposed by Ordinance of the City of Louisville, and which was declared to be valid by this Court in City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248. In holding the Ordinance to be valid, we rejected the contention that it imposed an income tax and adopted the contention of the City that the Ordinance 'lays the tax upon the privilege of working * * * within the City, and

only measures the value of the privilege by the amount of earnings or net profit.' "

This city tax which "lays the tax upon the privilege of working within the City and only measures the value of the privilege by the amount of earnings or net profit" seems to fit neatly into the definition (Section 110 (c)) of tax authorized by the Congress to be levied on persons "receiving income from transactions occurring or income earned in such (Federal) areas" (Section 106).

Appellants insist, however, that Congress has allowed the imposition of a "local income tax," and as the Kentucky Court has denied that this occupation tax is an "income tax," that Act of Congress has no application. We think it obvious that the definition of income tax in Section 110 (c) of that Act to be any as may be "measured by net income, gross income or gross receipts," authorizes the inclusion within the scope of that Act of the popular State levies in the form of use privilege and occupation tax "measured by" income (see 27 Am. Jur., Taxes, Sec. 7) as well as those technically known as income taxes.

According to the Supreme Court of Pennsylvania, in its opinion on the liability for the city tax of Philadelphia Navy Yard workers, this Buck Act and its companion, the Public Employees Salary Act (Title 5 U.S.C.A., Sec. 84 (a)), were directly related to the cases of James v. Dravo Contracting Co., 302 U. S. 134, and Silas Mason Co. v. Tax Commission, 302 U. S. 186, both concerning State "privilege" taxes, as dis-

tinguished from income taxes, based on gross income. These Acts were designed to level the distinction between Federal contractors and employees who theretofore depended upon the accident of place of the taxpayer's residence and the accident of the wording of the various Statute statutes ceding more or less jurisdiction to the Federal Government over lands where the taxpayers earned their income, Kiker v. City of Philadelphia, 346 Pa. 624, 31 A. 2d 289, 296.

One last word on the relation of the Louisville occupation tax to the definitions of the permissive income tax of the Buck Act. In the present case, the Kentucky Court of Appeals determined in its opinion that the Louisville occupation tax was within the terms of that Act (R. 30):

> "The tax clearly falls within the definition made by the Act of Congress."

That finding may well settle the question argued in this section of the brief. This Court has stated many times that it is generally bound to the interpretation given by State courts of State legislation. In the recent case of Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U. S. 495, this Court reiterated its position as to interpretation of local tax statutes, at page 499:

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of

their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts."

Whether this Court binds itself to the declaration of the State court or whether it makes its own findings as to the relation of a local tax statute to the definition in the Act of Congress, we are confident that the Louisville occupation tax is within the terms of the Buck Act.

THE STATE DETERMINES THE POLITICAL GEOGRAPHIC LOCATION OF ALL ITS LAND WITHIN ITS BOUNDARIES.

The argument in the Supreme Court of the United States of political geography of the Federal land as opposed to political sovereignty over it, must be done insofar as controlling Federal decisions, by deduction. Political geographic location of Federal areas within a State has never been, and is not here, a concern of the Federal Government since the sovereign interests of the United States have always been secure from interference from local sovereignty. Questions of internal State political boundaries and their relations to Federal enclaves have been problems for the State courts where there have been decisions on the effect of shifting State political boundaries to include Federal property.

Appellees admit that the land on which the Naval Ordnance Plant is situated is under the exclusive ju-

risdiction of the United States. Article 1, Section 8, Clause 17, of the Federal Constitution, reads:

> "The Congress shall have the power * * * to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings,"

This Naval Ordnance Plant can easily be termed a fort, magazine or arsenal. The fact that it was condemned and not purchased, as provided in Clause 17, does not affect its tenure, Kohl v. U. S., 91 U. S. 367. The fact that the State of Kentucky has given a "consent to acquisition" of the property by the United States, not in the constitutional language of "consent to purchase," does not affect it (see Appendix). The power of exclusive legislation over places acquired under Clause 17 means exclusive jurisdiction over such property, U. S. v. Unzeuta, 281 U. S. 138. And exclusive jurisdiction of the United States is fairly prohibitive of any sovereign Act of the State within that property. Arlington Hotel Co. v. Fant, 278 U. S. 439; Surplus Trading Co. v. Cook, 281 U. S. 647; Standard Oil Co. v. California, 291 U. S. 242; Pacific Coast Dairy Co. v. Department of Agriculture of California, 318 U. S. 285.

Appellants argue that when exclusive jurisdiction of lands within a State is assumed by the United States, such lands cease to be a part of the State. According to their theory, the act of annexation of territory surrounding this Naval Ordnance Plant was a legislative Act by the City and could have no effect upon the land theretofore occupied by the Naval Ordnance Plant. The picture in the extension of the city boundaries is complete, except for the hole in the area annexed, where the core or plug of the Naval Ordnance Plant had been removed some ten years previously. It is awkward to visualize the separation of the earth by the withdrawal of that core even as a legal concept. The only precedent which comes to mind is the island of Leputa, a creature of Jonathan Swift, for a wonder to be visited by Gulliver in his travels. The "Island of Leputa, the Flying or Floating Island is exactly circular, its diameter 7,837 yards, or about four miles and one-half, and consequently contains 10,000 acres. * * * But the greatest curiosity upon which the seat of the island depends is a lodestone of a prodigious size, in shape resembling a weaver's shuttle * * *. By means of this lodestone, the island is made to rise and fall and move from one place to another." By contrast, the Naval Ordnance Plant remains affixed on Strawberry Lane in South Louisville.

The taking and disposition of land by Congress is controlled, of course, by the Constitution. Congress may acquire property under Article 1, Section 8, Clause 17, of the Federal Constitution, or as any other proprietor by contract in its governmental capacity, Col-

lins v. Yosemite Park & C. Co., 304 U. S. 518. By express provision of Article 4, Section 3, the Congress has the power to dispose of property belonging to the United States. There is no provision in the Constitution, nor has the Constitution been so broadened by judicial interpretation, to give the power to Congress to withdraw property or add property to an existing State within the Republic. It may be that the provisions of Clause 17, Section 8 of Article 1, permit such physical setting apart of lands of the States and the physical restoration of same to the States at the end of the use of the United States. But it has never been so decided, nor has any thought of the State's relinquishment of property within its political boundaries been to that effect. Taking at random quotes from 49 American Jurisprudence, States, Territories and Dependencies:

> "Unless otherwise declared by Congress the title of every species of property owned by a territory passes to the state upon its admission to the Union" (p. 231).
>
> "Where the boundary line of a state is once established Congress is without power to alter the line without the state's consent" (p. 240).
>
> "It has been said that the state in its quasi-sovereign capacity has an interest independent of and behind the titles of its citizens in all the earth and air within its domain" (p. 268).

It is our contention that the cession of jurisdiction over its lands by a State to the United States cedes only such jurisdiction that the United States is able

to acquire for its purposes under the Constitution. And the power of Congress to withdraw and restore territory from the States is not within the terms or the intent of the Constitution. In spite of the language of the opinions dealing with the exclusiveness of congressional authority, to the exclusion of State sovereignty in these Federal areas, there is a vestige of State sovereignty remaining which cannot be acquired by the United States because of the limitation of the United States to powers delegated under the Constitution. The vestige of State jurisdiction is sufficient to cover the State's ability to determine its own internal physical boundaries to include or exclude those Federal areas therefrom.

This limitation of Federal jurisdiction was set out in a letter dated February 11, 1856, from Mr. Cushing, the Attorney General, to Mr. Guthrie, the Secretary of the Treasury, concerning the consent of the State of Virginia to the acquisition by the United States of property for post offices. The State of Virginia, in wording its consent, reserved the right to execute process upon the property and to do such other legal "functions as would not be incompatible" with the consent theretofore given. In his letter, 7 Op. Attorney General, 628, Cushing said:

> "Now it is thoroughly settled by numerous adjudications that all such Federal jurisdiction as the Constitution contemplates is acquired by the United States in the mere consent of the state to the purchase; and that upon such consent, jurisdiction of the State ceases, and that of Congress

comes in by virtue of the Constitution. * * *

"* * * the statute recognizes a ceded Federal jurisdiction, co-extensive with the demand of the Constitution of the United States, whatever that may be. It reserves for the State only such authority as may not be incompatible with the constitutional completeness of the authority ceded to the United States * * * but all such rights would remain to the State by operation of law, even if not expressly reserved. For, on the general principle of constructive relation between the United States and each of the states, the former cannot take from a State anything more than is 'within the contemplation' of the Constitution of the United States, however broad and indefinite may be the terms of grant by a particular State."

The exercise by a State, within the entire territory embraced by its external boundaries, of purely administrative functions which are necessary to preserve to the State its rights guaranteed by the Constitution is not inconsistent with exclusive jurisdition of the United States so long as the exercise of such functions does not interfere with any of the constitutional functions of the Federal Government within areas of its sovereignty. The State may not surrender to the Federal Government the right to exercise those means which are necessary to accomplish the powers reserved to it by the Constitution. Among those functions is the right of the local legislature to direct the extent of the boundaries of its municipalities. In 37 Am. Jur., Mun. Corp., Sec. 23, it is said:

"In the absence of constitutional limitations it is generally considered that the power of a state legislature over the boundaries of the municipalities of the state is absolute and that the legislature has power to extend the boundaries of a municipal corporation, or to authorize an extension of its boundaries, without the consent of the inhabitants of the territory annexed, or the municipality to which it is annexed, or even against their express protest."

No mention is made in that quotation of the possible protest of the United States (if such could be conceivable) because of the inclusion of an area under its control within the boundaries of the city by direction of the State Legislature. So far as we have been able to determine, that question of inclusion of Federal areas did not arise until 1944 (and then not by protest of the United States) in the case of Wichita Falls v. Bowen, 143 Texas 45, 182 S. W. 2d 695, after which a note was added in Am. Jur., to Section 26 of the article on Municipal Corporations, wherein it was set out:

"It has been held that annexation of territory by a home-rule city is not precluded by the fact that such territory is a United States military reservation under the exclusive jurisdiction and control of the United States notwithstanding that the power of the city may be curtailed and even suspended during the time the territory is under such jurisdiction and control."

That Texas case was also made the source of the text of 62 Corpus Juris Secundum, Mun. Corp., Sec. 46, p. 133, where it is stated.

> "State property may be included in territory annexed to a municipality as may be territory under exclusive jurisdiction of the federal government."

That Texas case, Wichita Falls v. Bowen, *supra*, involved the municipal control of a bus line operation in and out of the military reservation of Sheppard Field, which was under the exclusive jurisdiction of the Federal Government, and which had just previously been included in territory annexed to the City of Wichita Falls. Bowen contended that the city could not control his rates or levy a tax based on his revenues from his operation within the confines of the airfield. In rejecting his claim and passing on the geographical question of extension of city boundaries, the court said:

> "If we properly interpret Bowen's motion for rehearing, he contends that since Sheppard Field is a United States military reservation, under the exclusive jurisdiction and control of the Federal Government, the City of Wichita Falls had no power to assume jurisdiction over it by annexing it thereto. We are not impressed with this contention. Certainly Sheppard Field is a part of the State of Texas, and this is so even though we concede that it is under the exclusive jurisdiction and control of the United States Government. By the same token, it can be a part of an incorporated city within this State. Of course, the power of the city,

like the power of the State, to exercise jurisdiction and control over its territory may be curtailed, and even suspended, during the time it is under the jurisdiction and control of the United States Government; but that fact would not justify a holding that it cannot become a part of the area of an incorporated city."

Some three years later there arose in the Virginia court the question of annexation by the City of Portsmouth of territory in Norfolk County, within which was the United States Navy Yard, Norfolk County v. City of Portsmouth, 45 S. E. 2d 136. One of the objections to annexation was that the Navy Yard, being under the exclusive jurisdiction of the United States, could not be annexed as part of the city. Apart from the text references above or the authority of Wichita Falls v. Bowen, *supra,* the independent conclusion of the Virigina court was:

"We think the Navy Yard should, nevertheless, be included in the boundary of the annexation area. Its activities are adjacent to and closely associated with the City of Portsmouth * * *. The functions of assessment and collection of income, sales and use taxes which Congress now permits the State to exercise over this Federal area can be performed more conveniently and appropriately through the taxing authorities of the city than those of the county. After such annexation the Navy Yard will occupy the same relation to the city that it now does to the county. This will be the only effect of its inclusion in the area."

These State decisions do not wrestle with the doctrines of the legal effect of transferring exclusive jurisdiction to the United States as is being vigorously urged in this case. It can be inferred, however, from those opinions holding that one political subdivision of the State is substituted for another without disturbing the functions of the Federal Government taking place inside, that there is the innate feeling that the territory is not bodily lifted from the boundaries of the State as a "Flying Island" or "separate province," but that the transfer from one political State entity to the other is possible under the State's inherent power to geographically limit its territory, regardless of the cession of exclusive jurisdiction to the Federal Government.

In the same line of reasoning of non-interference with the functions of the Federal Government by the local authorities during the tenure of the United States govenment of its Federal area is the case of City of Anchorage v. Akers, 100 F. Sup. 2, in the District Court of Alaska, commenting upon the plaintiff's claim of immunity from taxation by the City of Anchorage because he resided on property reserved from the town site of the city for uses of the Alaska Railroad, which was subsequently included in the City. The District Court reasoned:

> "In support of the second ground appellant argues that implicit in the order carving the railroad reserve out of the original town site reserve, it is the intent that the area embraced thereby should not thereafter be included within the cor-

porate limits of Anchorage. This conclusion does not necessarily follow. It appears reasonably clear that the purpose of Executive Order Nos. 2242 was to withdraw the area described from settlement, location, entry and all other forms of appropriation, and reserve it for use in connection with the operation and maintenance of the Alaska railroad. Manifestly the right to include such an area within a municipality depends not on source or kind of title, but upon whether its inclusion would interfere with the purpose for which the area was set aside. Day v. City of Salem, 65 Or. 114, 131 P. 1028, 1030; City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S. W. 2d 695; 2 McQuillin 307, Sec. 7.18. Appellant also suggests the absurdity of the notion that a municipality may exercise its ordinary functions in military and like reservations. But this argument overlooks the fact that the Constitution contemplates the co-existence of state and federal governments, side by side, each supreme within its sphere. The line of demarcation between the two is, in certain situations, often nebulous, with an overlapping of jurisdiction and consequent controversy. But it should be noted that in each case the determinative factor is encroachment in the constitutional sense and the ultimate question is not whether the two function within the same area, but whether there is an interference with the functions of one or the other. Here the inquiry is whether the exercise of the power to tax personal property of residents within the railroad reserve is incompatible with the functions of the United States or the accomplishment of the purposes for which the area was set aside. That a state or political subdivision thereof could not obviously be per-

mitted to exercise its functions within a military reservation in the occupation of the armed forces of the United States does not detract in the slightest from the applicability of the test referred to other reservations. It is not perceived, nor does the appellant point out, how the taxation of the personal property of the residents in the railroad reserve would interfere with the United States in the operation or maintenance of the railroad. Cf. Silas Mason Corp. v. Tax Commission, 302 U. S. 186, etc; James v. Dravo, 302 U. S. 134, etc.; Oklahoma Tax Commission v. Texas Co., 336 U. S. 342, etc. Appellant's argument that personal property in the offices of federal officers and employees within the reserve, is immune from taxation not only discloses a misconception of the law, but assumes the very point to be decided. It would make every federal reservation a sanctuary for federal personnel not unlike that accorded foreign diplomats. It would serve no useful purpose to pursue this alluring fantasy into all its possible ramifications. The analogy is not a true one and does not merit serious consideration or extended discussion. It may, however, be noted in passing that the trend of Supreme Court decisions is to restrict and abrogate tax immunity rather than to extend it."

In Kiker v. City of Philadelphia, cited above, plaintiff sought to evade the city occupational tax by stating that the Philadelphia Navy Yard on which they were employed was not a part of the City of Philadelphia because it had been withdrawn by the assumption of exclusive jurisdiction over the land by the United States. As far as location within political boundaries of the State of Pennsylvania, the court said:

"The area in which plaintiff (Kiker) is employed or engaged * * * is now physically a part of the mainland of this Commonwealth. The reservation is immediately adjacent to Philadelphia, and geographically within its limits, and since December 31, 1940, because of the provisions of Public Act. No. 819 (The Buck Act) is actually a part of that City for the purposes of imposing the tax here under consideration." 31 A. 2d 295.

We insist strongly that there is a vestige of jurisdiction left within the State after Congress has assumed the power to exercise exclusive legislation of the land ceded by the State to the Federal Government. The court below in the instant case had a theory that for purposes of this case, Congress had re-ceded authority to the State to determine in which political boundary Federal areas in the State of Kentucky were to be, upon passage of the act permitting State and local government taxation within the area (R. 29). The Kentucky Court of Appeals reasoned that in 1940 Congress gave the power to local taxing authorities within the states to tax individuals on the Federal areas (the Buck Act), thereby re-ceding to the State authority to determine in which political subdivision those areas should lie for purposes of permitted taxes. The annexation ordinance of Louisville, under the authority of the existing State law, occurred subsequent to such recession and so was effective to include the Naval Ordnance Plant within the confines of the City

of Louisville for purposes of imposing a city occupation tax on individuals therein.

We still argue that the State retains a modicum of jurisdiction which the United States cannot assume upon its assumption of control of the property but we are grateful for the favorable interpretation of the State court.

The last clause of Title 4, Section 106, in which Congress allowed the imposition of the local occupation tax can be read in support of the theory of recession of the Kentucky Court of Appeals. By that section, the taxing authority has full jurisdiction and power to levy and collect the tax in any Federal area within such State to the same extent and with the same effect *as though such area was not a federal area.* By those emphasized words Congress may have placed so much of the plug theretofore withdrawn back into the soil of Kentucky and freed that part from the exclusive power of congressional legislation.

COMPLETE EXCLUSION OF THE STATE FROM FEDERAL PROPERTY IS CHANGING INTO A CONCEPT OF FREEDOM OF THE FEDERAL GOVERNMENT FROM EMBARRASSMENT BY THE STATE IN THOSE AREAS.

In the last twenty years United States has acquired from the states an immense amount of land for its governmental projects, out of all proportion to acquisitions accomplished theretofore. Those federal projects requiring land within the states have likewise increased in number and difference over that period. Resettle-

ment, reclamation, power, navigation, national parks, military areas, under the auspices of the federal government have required increasing holdings of real estate to be brought within the proprietorship of the national government. Each acquisition has had some immediate detrimental effect in the function of the local political government primarily as a loss of source of revenue from the land and its produce. The states have not been reluctant to acquiesce in the purchase of State lands by the Federal Government, hoping that as time stretched out, the lost revenues would be rejuvenated in greater amounts by the increased activities brought on by the execution of those Federal projects. The co-existence of two sovereign governments in the same area has, however, brought its problems and sources of friction.

Long ago the states began to hedge on the cession of exclusive power of legislation to Congress as contemplated by Article 1, Section 8, Clause 17 of the Constitution. The reservations were recognized early in the nineteenth century with New Hampshire's retention of power to serve State process on military reservations, United States v. Cornell, 2 Mason 60; and it culminated with the State of Washington reserving complete concurrent jurisdiction in Silas Mason Co. v. Tax Commission, *supra*.

Kentucky, it is true, has made no reservations in its general consent to the acquisition of the land by the United States under Clause 17. Nevertheless, the interpretation of the exclusiveness of jurisdiction to the

United States under Clause 17 has not been built on Kentucky consents alone but upon situations arising in all the states. Presently the assumption of jurisdiction under Clause 17 does not mean jurisdiction exclusively in the United States in spite of the wording of that section of the Constitution.

Up to the case of James v. Dravo Contracting Company, *supra*, in 1937, the Court tried to hold to the line of exclusiveness of Federal jurisdiction of property taken under Clause 17, treating reservations of state power as acceptable exceptions to the rule. This is evidenced by the short opinion denying authority of the State in 1934 in Standard Oil Company v. California, *supra*. In Pacific Coast Dairy v. Department of Agriculture, *supra* (1942), the court divided between the mere assertion of the doctrine of exclusiveness of jurisdiction and the practical effect of the California Milk Code upon the governmental function. A great deal of force of the doctrine of exclusiveness of jurisdiction and its effect upon the Federal-State relations within the same area was withdrawn by the decision in the preceding case of Penn Dairies v. Milk Control Commission, 318 U. S. 261, where an opposite conclusion was reached due to the type of tenure of the Federal government. The proprietorship of the Indiantown Gap Reservation was held under a permit from the State of Pennsylvania, while Moffett Field was held with the consent of the State of California.

In both of the State Milk Control cases, the United States Government, through Solicitor General Fahy,

was an active participant in the case in opposition to the State demonstrating the active effect of the State controls upon the functions of the War Department. In the instant case the effect of changing of State political boundaries is completely passive insofar as the functions of the United States. No department of the Federal Government has evidenced any interest at any phase of these proceedings, concerning the outcome of this case.

This practical application of harmony between the Federal and local governments, as manifested by the opinions of this court, has been directly implemented by Congress in its legislation permitting the states to exercise State functions on individuals within those Federal areas. In addition to the Buck Act, here in issue, and the Public Employees' Salary Act, mentioned above, Congress has passed such measures as the Assimilative Crimes Act, Title 18, U. S. C. A., Section 451, and Title 40, U. S. C. A., Section 290, applying State Workmen's Compensation Laws to buildings and works of the United States, and other legislation, integrating Federal functions with those of the surrounding territory.

This trend is pertinent here where the annexation of territory embracing a Federal area has no effect upon, much less embarrassment to, the function of the United States carried on in that Federal area, and, of interest in this case to determine the bar asserted by individual taxpayers seeking to evade the import of a Congressional Act permitting the tax on them.

CONCLUSION.

The success or failure to either party in this suit hinges upon this Court's view of the effect of the timing of the legislative ordinance of the City annexing this territory in relation to the acquisition of the land embracing the Naval Ordnance Plant by the United States and the assumption of "exclusive jurisdiction" over it. The annexation by the City by ordinance under general power given by State statute was a legislative Act of the City affecting the location of Federal land within State political boundaries.

There is no escaping the language of cases from this Court built up during the history of the nation concerning the exclusion of State jurisdiction not specifically retained in areas acquired by the United States with the State's consent. They must be distinguished upon the situations presented involving State-Federal relations within the area.

Without cataloguing each one, let us take those cases cited in Standard Oil Co. v. California, *supra.* Arlington Hotel Co. v. Fant, concerned the imposition of an Arkansas statute relieving hotel keepers of liability for destruction by fire of the property of guests sought to be asserted in determining the liability following the burning of a hotel used in connection with a military hospital. U. S. v. Unzeuta involved a conflict between the State court and Federal court over the jurisdiction of Unzeuta for a murder committed in a railroad car on the right-of-way through

Ft. Robinson. In Surplus Trading Company v. Cook, the State of Arkansas attempted to assess the Trading Company for taxes on personal property still in the warehouses within an Army mobilization training and supply station. Standard Oil v. California itself concerned the imposition of the State tax on gasoline sold and delivered to the post exchange within the Presidio of San Francisco. All of the above represented an active conflict of sovereign authority in the legislative and judicial processses of the States involved, and the United States. In the instant case, we have no conflict of sovereignty but a pure question of political geography.

We have argued that every vestige of jurisdiction of a State is not surrendered to the Federal Government upon the acquisition of land by consent of the State under Clause 17, Section 8 of Article 1 of the United States Constitution for the reason that the United States Government, being a government of delegated powers under the Constitution, cannot assume powers not conferred upon it. And the States, having reserved the powers not granted the United States under the Constitution, may not give up their sovereignty insofar as determining the extent of their own internal political boundaries and the actual land to be embraced therein. The United States, in its governmental functions as delegated to it by the States, has no possible use as a national government for the power of determining those internal boundaries and there can be no constitutional power by implication more than by direct authorization. According to

the Court of Appeals of Kentucky, the Buck Act of Congress receding generally to the States the power to impose local taxes may color the picture of recession of power to determine political boundaries, if the United States has such power, as set out by the Court of Appeals of Kentucky; that Court determined that a recession of power to tax to the local government further receded to the State a power to determine in what local political taxing subdivision the Federal areas were to be located for purposes of the imposition of such tax.

Since Congress has receded the power to tax, the question of political geography of the area in this case should be viewed in relation to the growing tendencies of both Congress and the courts to allow the States to assert their administrative functions as opposed to their plenary sovereign powers where there is no possible interference with the Federal function for which the land was acquired, or is currently being used.

We see no reason why appellants here should be protected from the powers of the local government which have been determined by Congress not to be a burden upon the Federal function, to escape the taxation of the local government by asserting the bar of a provision of the Federal Constitution designed to protect the sovereignty of the Federal Government; or further escape because of the accident of time of acquisition of the property by the Federal Government

which other Federal employees within the area in the same position do not enjoy.

Respectfully submitted,

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APPENDIX.

Kentucky Revised Statutes

3.010 **Consent of state to acquisition of lands.** The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legaliy acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of forts, magazines, arsenals, dock yards, post offices, custom houses, courthouses and other needful buildings, and for locks, dams and canals in improving the navigation of the rivers and waters within and on the borders of Kentucky.